

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



249

IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,807

---

LESLIE A. ISAACS,  
*Appellant,*

v.

BURTON M. COOPER,  
*Appellee.*

---

APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

BRIEF FOR APPELLANT

---

United States Court of Appeals  
for the District of Columbia Circuit

FILED DEC 28 1970

*Nathan J. Pearson*  
CLERK

JACOB P. BILLIG  
NORMAN C. BARNETT  
TERRENCE D. JONES

1108 16th Street, N.W.  
Washington, D.C. 20036

*Attorneys for Appellant*

December 28, 1970

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES	1
JURISDICTIONAL STATEMENT	3
STATUTES INVOLVED	6
SUMMARY OF ARGUMENT	6
ARGUMENT	10
A. The Lower Court Committed Reversible Error in Granting Appellee's Motion for the Appointment of a Receiver	10
1. The Appointment of a Receiver in the Circumstances Here Presented Is Contrary to Precedent	10
2. The Appointment of the Receiver Was Conclusively Erroneous Because Appellee's Complaint Shows That He Cannot Prevail Upon the Merits of His Case	21
3. The Appointment of the Receiver On the Facts Here Presented Contravenes Public Policy	29
B. The Lower Court Erred in Failing to Grant Appellant's Request for Relief Under 41 D.C. Code Section 337	31
1. All of the Facts Which Show That Appellant Is Entitled to Section 337 Relief Are Set Forth in Appellee's Complaint	31
2. The Lower Court, in Denying Appellant's Request for Immediate Section 337 Relief, Has Erroneously, Arbitrarily and Capriciously Read an Important and Here Indispensable Right Out of the Uniform Partnership Act	44



	<u>Page</u>
CONCLUSION	49
CERTIFICATE OF SERVICE	50
APPENDIX A:	
Complaint Partnership Agreement (Exhibit A)	
APPENDIX B:	
Opinion and Orders of United States District Court for the District of Columbia	
APPENDIX C:	
Applicable D.C. Code Provisions	

TABLE OF CASES

	<u>Page</u>
* <u>Aiman v. Aiman</u> , 61 Montg. Co. L.R. 51 (Pa. 1944)	39
<u>Albrecht v. Diamon</u> , 125 Minn. 283, 146 N.W. 1101	16
<u>Application of Pivot Punch &amp; Die Corpora- tion</u> , 182 N.Y.S.2d 459 (Sup.Ct. N.Y. 1959)	35
<u>Auer v. Wagner</u> , 101 Pitt. L.J. 29 (1950)	29
<u>Bates v. McTammany</u> , 76 P.2d 513 (Cal. 1938)	41
* <u>Clark v. Allen</u> , 333 P.2d 1100 (1959)	34, 36
<u>Collins v. Lewis</u> , 283 S.W.2d 258 (Tex. 1958)	24
<u>Creel v. Creel</u> , 63 App. D.C. 384, 73 F.2d 107 (1934)	11, 24
* <u>Dobbins v. Tatem</u> , 25 Atl. 544 (N.J. 1892)	39
<u>Dolenga v. Lipka</u> , 195 N.W. 90 (Sup.Ct. Mich. 1923)	14, 47
<u>Drasker v. Sorenson</u> , 63 N.W.2d 255 (1954)	41
<u>Fisher v. Fisher</u> , 212 N.E.2d 222 (Sup. Ct. Mass. 1965)	13
<u>Fooks v. Williams</u> , 87 A. 692 (Ct. App. Md. 1913)	14
<u>Frederick v. Barry</u> , 68 N.E.2d 690 (Sup. Jud. Ct. of Mass. 1946)	13
<u>Healey v. Steele</u> , 13 P.2d 140 (1932)	18
<u>Jones v. Jones</u> , 16 S.W.2d 503 (Ct. App. Ky. 1929)	14

	<u>Page</u>
<u>Josephthal v. Gold</u> , 171 N.Y.S. 1041	24
* <u>Karrick v. Hannaman</u> , 168 U.S. 328	23
* <u>Klass v. Yavitch</u> , 302 Ill. App. 229, 23 N.E.2d 936 (1939)	15, 21
* <u>Maxwell v. Enterprise Wall Paper Manfg. Co.</u> , 131 F.2d 400 (1942)	17
<u>Mervyn Inv. Co. v. Biber</u> , 194 P. 1037 (Cal. 1921)	41
<u>Moffett v. Pierce</u> , 24 A.2d 448 (1942)	18
* <u>Napoli v. Domnitch</u> , 226 N.Y.S.2d 908 (1962), <u>modified</u> , 236 N.Y.S.2d 549 (1962), <u>aff'd</u> , 248 N.Y.S.2d 228 (1964)	24-27, 29, 34
<u>O'Donnell v. McLaughlin</u> , 386 Pa. 187; 125 A.2d 370 (1956)	29
<u>Owen v. Cohen</u> , 119 P.2d 713 (Sup. Ct. Cal. 1941)	12, 41
<u>Phillip v. Von Raven, et al.</u> , 57 N.Y.S. 701 (Sup.Ct. 1899)	48
<u>Potter v. Brown</u> , 328 Pa. 557, 195 A. 901 (1938)	18
<u>Rutland Marble Co. v. Ripley</u> , 10 Wall 339	24
<u>Singer v. Heller</u> , 40 Wisc. 544 (Sup. Ct. Wisc. 1876)	13
<u>Stark v. Reingold</u> , 113 A.2d 679 (Sup. Ct. N.J. 1955)	13
<u>Stoner v. Hannan</u> , 113 Mont. 210, 127 P.2d 233 (1942)	18
* <u>Straus v. Straus</u> , 94 N.W.2d 679 (Sup. Ct. Minn. 1959)	16, 17, 34, 41-43, 48

Page

Thickman v. Schunk, 436 P.2d 542  
(Wyo. 1966)

29

Wrenn v. Wrenn, 91 S.E.2d 267  
(Sup. Ct. S.C. 1956)

14, 47

\* Cases chiefly relied upon are marked by asterisks.

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,807

---

LESLIE A. ISAACS,  
Appellant,

v.

BURTON M. COOPER,  
Appellee.

---

APPEAL FROM ORDERS OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

BRIEF OF APPELLANT

---

STATEMENT OF ISSUES

1. Did the lower court err in granting appellee's request for the appointment of a receiver to fully direct and control the partnership business of appellant and appellee, pending determination on the merits of appellee's request for a dissolution and liquidation of the partnership business for the purpose



of permitting appellee to secure the value of his interest therein, where --

(a) the partnership business is wholly solvent and profitable and, in fact, enjoying unprecedentedly high revenues and earnings;

(b) no breach of any duty by appellant toward the partnership has been alleged by appellee, but only "irreconcilable differences concerning business policy," for which the lower court could not assign fault, as between appellee and appellant;

(c) the partnership agreement fully provides for the relief requested by appellee upon disposition of the merits of his suit -- the payment to him of his share of the value of the physical assets and good will of the partnership business; and

(d) where the partnership agreement also provides that in the event of such election of appellee to receive the value of his interest in the partnership, appellant shall have the right and option to continue the business?

2. Did the lower court also err in appointing the receiver because appellant was entitled to be granted his pendente lite request to take possession of the partnership property and continue the

business of the partnership, pursuant to Section 337 of Title 41, District of Columbia Code?

3. Did the lower court err in refusing appellant's requested Section 337 relief and in holding, inter alia, that appellee's filing of the instant suit did not constitute a wrongful dissolution of the partnership, and that the granting of the relief requested by appellant under 41 D. C. Code Section 337 would be inconsistent with the Uniform Partnership Act?

This case has not previously been presented to this Court under the same or similar title. However, on December 10, 1970, a Panel of this Court denied appellant's motion for summary reversal and his alternative request for a stay pending appeal. It further ordered an expedited briefing schedule.

#### JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based upon 28 U.S.C. §1292(a)(1) and (2), which provides for appeals from orders of the district court denying injunctions or appointing receivers, both of which are involved herein.

REFERENCES AND RULINGS

The orders and opinion herein under review are as follows:

1. Order appointing receiver pendente lite issued November 12, 1970.

2. Order denying defendant's requested relief pendente lite issued November 12, 1970.

3. Memorandum opinion of United States District Court issued November 12, 1970.

Copies of these orders and opinion are set forth in the Appendix hereto.

STATEMENT OF THE CASE

This case arose upon appellee's filing of a complaint in the District Court seeking declaratory relief <sup>1/</sup> and dissolution

---

<sup>1/</sup> Appellee's request for declaratory relief sought a determination that the entity known as Lesco Associates was a partnership. A copy of the complaint and attached partnership agreement are set forth in the Appendix. At the hearing it was stipulated by appellant and appellee that the entity was a partnership. See memorandum opinion of the District Court, page 1, footnote 1, a copy of which is also set forth in the Appendix.



under Title 41, District of Columbia Code, Section 330, of a partnership known as Lesco Associates <sup>2/</sup> on the basis of alleged irreconcilable differences existing between the partners. Appellant on September 11, 1970 filed a counterclaim requesting damages for the wrongful dissolution of the partnership and also for relief permitting appellant to continue the business of the partnership both pendente lite and permanently, pursuant to Section 337 of Title 41, District of Columbia Code. <sup>3/</sup> Appellant also sought to enjoin appellee from competing with him or in any other way interfering with the business of the partnership. Appellant thereafter on September 15, 1970 requested immediate relief pendente lite. Appellee moved on September 21, 1970 for immediate appointment of a receiver and for dismissal of appellant's counterclaim. The District Court on November 12, 1970 issued an opinion and orders: (1) granting appellee's motion for the appointment of a receiver, and granting such receiver

---

<sup>2/</sup> Pursuant to the partnership agreement dated December 11, 1965, appellant Isaacs and appellee Cooper were equal partners in Lesco Associates. The business of the firm is the sale and distribution of janitorial supplies.

<sup>3/</sup> See Appendix for full text of statute. Essentially Section 337 provides that where a partner wrongfully dissolves a partnership in contravention of the partnership agreement, the remaining partners are entitled to continue the business of the partnership under the partnership name and to hold the assets of

(cont'd)

"full power to direct and control" the business; (2) denying appellant's motion for relief pendente lite; and (3) denying appellee's motion for dismissal of appellant's counterclaim.

In addition, the lower court denied on November 12, 1970 appellant's motion for a stay pending appeal of its order appointing a receiver to operate the business of the partnership, or, alternatively, a stay pending disposition of appellant's motion for a stay pending appeal to this Court.

On November 13, 1970, appellant filed this appeal, pursuant to the provisions of 28 U.S.C. §1292(a)(1) and (2), for reversal of the lower court's orders granting appellee's motion for the appointment of a receiver and denying appellant's motion for relief pendente lite. On November 17, 1970, appellant filed a motion for summary reversal or, alternatively, for a stay of the lower court's order appointing a receiver pending this Court's disposition of this appeal; and a motion for immediate hearing.

On November 24, 1970, appellee filed a motion to dismiss appellant's appeal from the order of the District Court denying his motion for relief pendente lite; an opposition to

---

3/ (cont'd)

the partnership upon the posting of bond or payment to the partner wrongfully dissolving, the amount of that partner's interest in the assets of the partnership not including good will and less any damages sustained because of the wrongful dissolution.

appellant's motion for a stay of the order of the District Court appointing a receiver; and a motion for summary affirmance of the order of the District Court appointing a receiver. On December 1, 1970, appellant filed a reply in opposition to appellee's motion to dismiss appeal in part.

By order of December 10, 1970 this Court, per Judges Tamm and Robb, denied all of appellant's and appellee's motions, and the parties were ordered within 15 days to file a stipulation setting forth an expedited briefing schedule. By stipulation filed on December 16, 1970, it was agreed that appellant's brief would be filed on or before December 28, 1970; appellee's brief on or before January 12, 1971; and appellant's reply brief on or before January 17, 1971.

#### STATUTES INVOLVED

Title 41, D.C. Code, Sections 330, 331 and 337, which are set out in the Appendix to this brief.

#### SUMMARY OF ARGUMENT

##### I

The lower court's granting of appellee's request for the appointment of a receiver was patently erroneous and constituted a clear abuse of discretion since no valid reason for the

granting of such drastic relief was found by the lower court. The appointment of a receiver was justified by the lower court solely on the basis of alleged "irreconcilable disagreements and dissension" between partners to a business, which the record below indisputably shows is wholly solvent and has throughout the period of the alleged "disagreements and dissension" enjoyed unprecedentedly high revenues and profits. In appointing the receiver, the lower court erroneously and without cause ignored the long-standing rule that equity is not a referee of partnership quarrels and that the confiscatory and "death-knell" receivership relief which it ordered should not be imposed upon a going and prosperous business, such as is here involved, merely because of alleged disagreements between partners which do not involve any breach of duty toward the partnership or its business.

## II

The lower court's appointment of a receiver was also patently erroneous and constituted a clear abuse of discretion because appellee made no showing that he could prevail upon the merits of the case. Indeed, the facts set forth in his own verified complaint show conclusively that he could not. In this respect, appellee's sole request upon final disposition of the

merits of the case is that the business of the partnership be dissolved and liquidated for the purpose of paying to appellee the value of his interest therein after payment is made to the creditors of the business.<sup>4/</sup> However, the partnership agreement between appellee and appellant, attached as Exhibit A to appellee's complaint, assured him the value of his interest in the good will as well as the physical assets of the business, merely by retiring therefrom.<sup>5/</sup> In addition, the partnership agreement safeguarded to appellant in all events and circumstances, including the event of an election by appellee to retire from the business, the option to continue the business of the partnership.<sup>6/</sup> Accordingly, the institution of appellee's suit to dissolve the partnership, following his admitted unequivocal notice to appellant that he would do so,<sup>7/</sup> constituted a breach of the partnership agreement; and having breached the agreement appellee, as a matter of law, is not entitled to the decree of dissolution which he seeks upon disposition of the

---

<sup>4/</sup> See Complaint, par. 3, p. 2, set forth in Appendix hereto.

<sup>5/</sup> See Exhibit A to Complaint, par. 14, p. 9.

<sup>6/</sup> Id., par. 12, pp. 4-8; par. 13, pp. 8-9; par. 14, pp. 9-11; par. 15, pp. 11-13; par. 16, pp. 13-14; par. 17, pp. 14-15; par. 19, pp. 16-17.

<sup>7/</sup> See Complaint, par. 3, p. 2.

merits of the case. In assuming that appellee could prevail upon the merits of the case, as the lower court was required to assume in granting him the interim relief which he sought, the lower court in effect erroneously found, contrary to fundamental principles of equity, that it would assist appellee, in contravention of his agreement with appellant, to procure a dissolution of the partnership.

### III

The fact that appellant, as a consequence of appellee's wrongful dissolution of the partnership in contravention of the agreement, was clearly entitled under 41 D.C. Code Section 337 to take possession of the property of the partnership and continue its business in its name, establishes another reason why the lower court erred in granting the mutually exclusive receivership relief sought by appellee. In denying appellant's request for Section 337 relief the lower court has erroneously in effect held that appellee has a supervening right to secure the "spite-fence" destruction of the partnership business, and defeat appellant's partnership agreement right to continue same; that the right to secure such "spite-fence" destruction is safeguarded by the Uniform Partnership Act; and that a partnership agreement which seeks to preclude it, such as the one in effect between appellee and appellant, may not be enforced under the Uniform Partnership

8/  
Act. On the basis of such preposterous misreading and misconception of the Uniform Partnership Act, the lower court erroneously, arbitrarily and capriciously refused to grant appellant the Title 41, Section 337 pendente lite relief to which he was plainly entitled and, indeed, as a practical matter, refused to recognize the existence of Section 337 and the relief provided for thereunder, in addition to arbitrarily closing its eyes to the applicability to the facts herein of the precedent cases cited by appellant.

ARGUMENT

A. The Lower Court Committed Reversible Error in Granting Appellee's Motion for the Appointment of a Receiver.

1. The Appointment of a Receiver in the Circumstances Here Presented Is Contrary to Precedent.

The lower court's granting of appellee's motion for the appointment of a receiver is solely based upon its findings that "there exist irreconcilable disagreements and dissension between the partners in regard to the conduct of their affairs as to endanger the partnership's good will and property"; and that such

---

8/ See pp. 6-7 of the lower court's Memorandum Opinion, set forth in Appendix.



disagreement and dissension "poses a threat to the continued  
success of the partnership business."<sup>9/</sup> However, the court  
noted that it "does not at this time place the fault on one  
party or the other...."<sup>10/</sup>

Even accepting for the purposes of this appeal the  
above findings of the lower court, upon which it solely based  
its appointment of the receiver, as true and correct, it is  
readily apparent that its granting of appellee's motion for a  
receiver constitutes a gross abuse of discretion. No case has  
been cited in which any court has appointed a receiver over a  
partnership for a specific term, such as here involved, solely  
on the basis asserted by the lower court -- "disagreement and  
dissension." Indeed, the only authority cited by the court in  
support of its action in this respect is Creel v. Creel, 63 App.  
D.C. 384, 73 F.2d 107 (1934), which is plainly inapposite.  
Therein, for example, the defendant admitted that during a 3-year  
period he did not notify plaintiff or the bookkeeper with respect  
to the amount of his personal withdrawals from the business; re-  
fused to execute notes for his borrowings from the partnership  
business; and had ordered the bookkeeper not to pay the firm's

---

<sup>9/</sup> Memorandum Opinion by lower court, p. 9.

<sup>10/</sup> Ibid.



bills. The decision also shows that defendant was absent from the business of the partnership for three years in which time he nevertheless withdrew money from the business in excess of plaintiff, and that he was hostile and defiant and neglected his obligations as a partner. (93 F. 2d at 107-108) Herein, on the other hand, the lower court's action is based, as noted, solely upon "disagreement and dissension," and even then without fixing any blame therefor upon appellant. In this respect, it is also noted that disagreements in the operation of the business were not beyond the contemplation of the parties inasmuch as in their partnership agreement each party is granted an equal voice in the management of the business. See paragraph 9, p. 3, of the December 11, 1965 partnership agreement between the parties.<sup>11/</sup>

Other cases cited by appellee in his papers below, and in support of his motions before this Court, are similarly inapposite. In Owen v. Cohen, 119 P. 2d 713 (Sup. Ct. Cal. 1941), the defendant was found guilty of serious misconduct, including

---

<sup>11/</sup> See, also, 41 D.C. Code §317(e) which provides that --

All partners shall have equal rights in the management and conduct of the partnership.

"persistent endeavors to become the dominating figure of the enterprise and to humiliate plaintiff before the employees and customers" (p. 715). Similarly, in Stark v. Reingold, 113 A. 2d 679 (Sup. Ct. N.J. 1955), the defendant was found guilty of obtaining information valuable to the partnership, concealing it and using it for his private benefit. Fisher v. Fisher, 212 N.E. 2d 222 (Sup. Ct. Mass. 1965), involved a situation where the partner "had failed to properly account to the partnership for monies he had received while in the insurance business." In Fisher it was also specifically found that the errant partner had been excluded from the partnership prior to the filing of the action. (212 N.E. 2d 224) In Frederick V. Barry, 68 N.E. 2d 690 (Sup. Judicial Court of Massachusetts, 1946), it was found that the defendant partner was slow in making full disclosure of his doings to his partners; he was wanting in spontaneous candor; and that he was indiscreet and created natural suspicion and distrust in the minds of his partners. (68 N.E. 2d 694) In Singer v. Heller, 40 Wisc. 544 (Sup. Ct. Wisc., 1876), dissolution had been ordered by the lower court because of "misconduct" of the defendant. The only issue before the Wisconsin Supreme Court was the damages to which the parties were liable.

Dolenga v. Lipka, 195 N.W. 90 (Sup. Ct. Mich., 1923),  
Fooks v. Williams, 87 A. 692 (Court of Appeals, Md., 1913), and  
Wrenn v. Wrenn, 91 S.E. 2d 267 (Sup. Ct., South Carolina, 1956),  
also cited by appellee, all involved partnerships at will  
(which could have been dissolved at any time by the election  
of any partner), and not as is the case herein a partnership  
for a specific term. Jones v. Jones, 16 S.W. 2d 503 (Court of  
Appeals, Ky., 1929), was also a partnership at will. Moreover,  
the receivership appointed in Jones was not over a going, pros-  
perous business, as is here presented. Thus, in Jones it was  
found that the receivership was there required to take care of  
and feed the livestock; sell the crops; prevent the farm from  
lying fallow for the coming season; prevent rapid deterioration  
of the farm implements; and fulfill an obligation to the United  
States Government to maintain a light on the farm for the pur-  
pose of navigation in the Tennessee River. (16 S.W. 2d 504)

The lower court's action is also unprecedented because  
it seeks to impose a receiver, solely because of "disagreement  
and dissension," upon an exceedingly profitable business and  
one which is wholly solvent. As indicated in appellant's Octo-  
ber 19, 1970 affidavit tendered in the proceeding below, it is  
unrefuted that the business of the partnership has been enjoying

unparalleled financial success during the very period in which appellee alleges the "disagreement and dissension" has been most intense.<sup>12/</sup>

The cases are legion and unbroken that the granting of the harsh and costly relief afforded to appellee by the lower court on the basis of the facts here presented constitutes an abuse of discretion. This was duly noted in Klass v. Yavitch, 302 Ill. App. 229, 23 N.E. 2d 936 (1939), with respect to the same type of receivership granted by the court below, as follows:

It is a peremptory measure, whose effect, temporarily at least, is to deprive of his property a defendant in possession, before a final judgment or decree is reached by the court determining the rights of the parties. It is therefore not to be exercised doubtfully, but the court must be convinced that the relief is needful, and that it is the appropriate means of securing an appropriate end. And since it is a serious interference with the rights of the citizen, without the verdict of a jury and before a regular hearing, it should be granted only for the prevention of manifest wrong and injury. And because it divests the owner of property of its possession before a final hearing, it is regarded as a severe remedy,

---

<sup>12/</sup> As noted in appellant's November 13, 1970 affidavit submitted to this Court, and in his affidavit of October 19, 1970 submitted to the lower court, for the fiscal year ending September 30, 1970, total gross revenues for the business were \$571,727. Gross revenues for the comparable period of the previous year were \$441,608. Thus, in the past year the gross revenues of the business have increased 29.7%. As for earnings, the business netted in excess of \$125,000 before taxes for the fiscal year ending September 30, 1970. The comparable figure for 1969 was \$85,000. Thus, net earnings before taxes for the business have risen over 45% in the past fiscal year.

not to be adopted save in a clear case, and never unless plaintiff would otherwise be in danger of suffering irreparable loss. And since a receivership is a harsh and costly remedy, interfering seriously with the rights of persons in possession, courts of equity exercise extreme caution in the appointment of receivers and withhold the remedy until a proper case has been made therefor. (23 N.E.2d at 938)

As also noted in Straus v. Straus, 94 N.W.2d 679 (Supreme Court of Minn., 1959):

This court has repeatedly said that courts will proceed with great caution in granting an application for a receiver to take possession of property pendente lite; that such application is addressed to the discretion of the trial court and will not be granted in a doubtful case; that the showing must be clear, strong, and convincing; and that the application will be granted only under circumstances requiring summary relief or where the court is satisfied that there is imminent danger of loss and where there is no adequate remedy at law. See, Bacon v. Engstrom, 129 Minn. 229, 152 N.W. 264, 537; Schmid v. Ballard, 175 Minn. 138, 220 N.W. 423; Helgeson v. Dart, 162 Minn. 521, 203 N.W. 229; Zwick v. Security State Bank, 186 Minn. 308, 243 N.W. 140; Bliss v. Griswold, 222 Minn. 494, 25 N.W. 2d 302. (94 N.W. 2d at 683-684)<sup>13/</sup>

The appointment of a receiver by a United States District Court in the circumstances here presented of a healthy, prosperous business was reversed by the United States Court of Appeals for

---

<sup>13/</sup> At page 683 of the Straus opinion, the decision of Albrecht v. Diamon, 125 Minn. 283, 146 N.W. 1101, in which the lower court's appointment of a receiver in similar circumstances as here presented was reversed, is cited with approval.

the Third Circuit in Maxwell v. Enterprise Wall Paper Manfg. Co., 131 F.2d 400 (1942). In his opinion in that proceeding Circuit Judge Goodrich noted that "the appointment of a receiver is an extraordinary, a drastic, and, in the words of the Pennsylvania court, an 'heroic' remedy" (p. 403). The court further held that where the involved enterprise is prosperous, as is the case herein, the propriety of a receivership must be carefully scrutinized, noting that --

"Major operations are seldom indicated for healthy patients." (p. 404)

In reversing the lower court's appointment of the receiver as an abuse of discretion, the court held --

. . . We do not find in the allegations, however, any such grounds of immediate emergency that call for the appointment of a receiver, characterized in the decisions as one of last resort, to the exclusion of other remedies. There is nothing to make it appear that the business is not being competently run; attention has already been called to the fact that it appears to be in a sound and prosperous condition. There are charges which, if substantiated, indicate that minority shareholders have not been receiving their share of the benefits of the enterprise. And if this appears to be the case, they are, of course, entitled to court help to secure them. But the help required falls far short in our judgment of the drastic remedy of receivership, certainly at this stage of the litigation. We conclude, therefore, that the appointment of the receivers in this case was beyond the discretion to be exercised by the trial judge. The order is, therefore, reversed and the case remanded to the District Court with directions to vacate the order appointing the receivers, and to retain the

case for further proceedings not inconsistent with this opinion. (pp. 404-405)

Or, as stated by the court in Potter v. Brown, 328 Pa. 557, 195 A. 901, 904 (1938):

Equity is not a referee of partnership quarrels. A going and prosperous business will not be dissolved merely because of friction among the partners; it will not interfere to determine which contending faction is more at fault. 14/

The abhorrence which the courts have uniformly expressed toward the appointment of receivers over going and prosperous businesses derives from the fact that the public cannot and does not distinguish between a receiver appointed for the purpose of winding up an insolvent business and a receiver appointed for any other purpose. Ordering a receivership for a going and prosperous business, as the lower court has done, is akin to ordering that a funeral hearse be parked in front of a doctor's office. The hearse in front of the doctor's office, as a court-appointed receiver for a business, is a sign of death and incompetence, and the public is guided accordingly. This was well recognized by the Supreme Court of Minnesota in Straus, supra, wherein at pages 682-683, it was noted that --

---

14/ See also, Moffett v. Pierce, 24 A.2d 448, 450 (1942); Healey v. Steele, 13 P.2d 140, 141 (1932); Stoner v. Hannan, 113 Mont. 210, 127 P. 2d 233 (1942).



(1) placing the business in the hands of a receiver would cause customers to conclude that it was being wound up and the effect upon its business would be injurious if not disastrous; and

(2) a receivership would add expense and ruin a going business, without helping anybody.

The identical situation here pertains. As noted in appellant's affidavit accompanying his November 17, 1970 motion for summary reversal filed in this Court:

... The appointment of a receiver, for any period, would be particularly devastating since it would cause an immediate loss of confidence by employees, customers and suppliers that they are dealing with a going, responsible company to which they can look for an assured continuous relationship. The business being conducted by the partnership is highly competitive. In this respect it is noted that several concerns are openly competing for a limited number of customers. Any change in the status of Lesco Associates which will render uncertain its continued ability to serve its customers will surely cause present customers to divert their purchases to competitors of Lesco Associates. The placing of the business into receivership will clearly create the air of uncertainty which will cause such diversion. In addition to the loss of customers which will accompany receivership is the loss of personnel and suppliers. Insofar as personnel are concerned, the janitorial supply business depends for its success on salesmen who continually service the customers. Competitive concerns have constantly attempted to lure salesmen away from Lesco Associates and to secure the



salesmen's customers. The uncertainty surrounding the status of Lesco Associates being placed into receivership will surely cause an increase of Lesco's competitors acting in this regard. Moreover, such uncertainty will surely cause salesmen to accept the offers of competitors.

Insofar as suppliers are concerned, Lesco presently holds exclusive distributorship franchises for many lines of janitorial supplies. These franchises in many cases can be cancelled by manufacturers at any time. Should a receiver be appointed, these franchises will be jeopardized and lost to competitors which in the eyes of a supplier would be more stable. Moreover, Lesco presently has open credit lines with many of these suppliers which inevitably would be cut off as soon as the suppliers receive notice of the receivership. Thus notwithstanding the loss of its franchises, Lesco will be faced with loss of its credit which is indispensable in order to permit Lesco to continue in business. (pp. 2-4)

In addition to the irreparable injury which will inevitably result to the business of Lesco Associates, is the irreparable injury to appellant Isaacs. In this regard, it is noted that the appellant has spent the greater part of his adult life building the business of Lesco Associates. The valuable asset of this business is not only the tangible property owned, but the good will of the business as a going concern. The appointment of a receiver, as the case law recognizes, is certain to destroy this good will, thus destroying appellant's life work as well as

<sup>15/</sup>  
his financial security.

2. The Appointment of the Receiver Was Conclusively Erroneous Because Appellee's Complaint Shows That He Cannot Prevail Upon the Merits of His Case.

The lower court's granting of appellee's requested pendente lite relief is further conclusively erroneous because appellee's complaint shows on its face that he cannot prevail upon the merits of his case. As stated in Klass v. Yavitch, supra, at page 938, a court appointing a receiver must be convinced "that it is an appropriate means of securing an appropriate end." Herein, it is readily apparent that appellee is not seeking "an appropriate end." As noted, the relief which appellee requests on the merits is the dissolution of the partnership business in order that he may secure the value of his interest in the partnership business. Thus, appellee states in his complaint that the purpose of his suit is --

"...to effectuate a dissolution of said partnership and to have its business wound up and liquidated according to law by paying all creditors and then dividing any surplus between them [appellee and appellant]." (Complaint, Par. 3, p. 2)

---

<sup>15/</sup> At pp. 3-4 of his November 23, 1970 Opposition to Motion for Stay, filed in this Court, appellee does not dispute that the partnership business would suffer a loss in customers, salesmen and suppliers as a consequence of the appointment of the receiver.

However, under his partnership agreement with appellant, appellee had the right to so secure the value of his interest in the partnership merely for the asking -- by retiring under the agreement.<sup>16/</sup> In fact, under the agreement appellee was guaranteed the value not only of the physical assets of the business, but the value of the good will as well,<sup>17/</sup> which appellant submits could only doubtfully be secured in any measure upon a dissolution sale.<sup>18/</sup>

All that appellee's suit could achieve which was not possible under the agreement, therefore, is the "spite-fence" destruction of the partnership business and the consequent inability

---

<sup>16/</sup> Exhibit A to Complaint, Par. 14, pp. 9-11.

<sup>17/</sup> Id., Par. 12, pp. 4-8.

<sup>18/</sup> Apparently, appellee believes to the contrary and for this reason has elected to contravene the agreement. This is apparent from his "complaint" at page 3, footnote 1, of his November 24, 1970 Memorandum in Support of Motion for Summary Affirmance of Order of the District Court Appointing a Receiver, filed in this Court, that --

Contrary to appellant's assertions the amount which would be owing under such formula [the one specified in the agreement] were appellee to retire, is far less than the figure appellee would receive from a sale of the business to a third party.

Or course, whether appellee would receive more or less upon a dissolution sale than he would by retiring under the agreement is irrelevant, since he is in any event bound by the agreement.

(Cont'd)

of appellant to continue it. But it was precisely this "spite-fence" destruction which the partnership agreement sought to preclude in providing that either partner could receive his interest in the business by retiring at any time, or selling his interest therein; that the remaining partner under all circumstances would have the overriding right and option to continue the business of the partnership; and that

---

18/ (Cont'd)

It is also significant, apropos of appellee's argument, that the parties provided in their partnership agreement that if one partner elected to sell to a third party, the other partner nevertheless must first be afforded the opportunity to purchase such partner's interest, and at the partnership agreement price -- even if it be less than the price the "selling" partner was to receive from the third party. (Exhibit A to Complaint, Par. 12, pp. 4-8) Hence, if appellee's suit is based upon an attempt to sell to a third party, as opposed to appellant, in order to secure a higher price than that provided for in the partnership agreement, granting dissolution relief to appellee would similarly be in contravention of the agreement.

the business of the partnership could be dissolved solely<sup>19/</sup> if there was mutual agreement of the parties to do so.

In seeking to secure his interest in the business by instituting this action for its dissolution and liquidation, appellee has plainly breached his partnership agreement with appellant, and having breached the agreement is not entitled to a decree of dissolution. Stated otherwise, in assuming that appellee could prevail upon the merits of the case, as the lower court was required to assume in granting him the interim receivership relief which he sought, the lower court in effect found, contrary to fundamental principles of equity, that it would assist appellee in contravention of his agreement with appellant to procure a dissolution of the partnership. Karrick v. Hannaman,

---

<sup>19/</sup> Exhibit A to Complaint, Par. 12, pp. 4-8; Par. 14, pp. 9-11; Par. 13, pp. 8-9.

168 U.S. 328; Rutland Marble Co. v. Ripley, 10 Wall 339, 358; Josephthal v. Gold, 171 N.Y.S. 1041; Collins v. Lewis, 283 S.W.2d 258 (Tex., 1958).

This fact, that the relief sought by appellee is in contravention of the partnership agreement, is another critically important distinction between this case and all of the others, including Creel v. Creel, supra, cited by appellee in support of the proposition that the appointment of the receiver is justified. The conclusion that appellee did breach his partnership agreement with appellant by the filing of his suit for dissolution and liquidation of the partnership business, and is therefore barred from securing relief upon disposition of the merits, has been clearly affirmed by judicial authority. Remarkably in point in this respect is Napoli v. Domnitch, 226 N.Y.S.2d 908 (1962), modified, 236 N.Y.S.2d 549 (1962), aff'd, 248 N.Y.S.2d 228 (1964). In Napoli, which arose under the here applicable Uniform Partnership Act, the pertinent provision of the partnership agreement in issue, paragraph 14, was quoted by the court at 226 N.Y.S.2d 908 as follows:

In the event one of the parties hereto desires to withdraw from the venture herein, he must first offer his interest to the remaining partners. Said offer shall be in writing advising the remaining partners of his intention

to sell and giving the remaining partners thirty (30) days in which to exercise their option. In the event a figure cannot be agreed upon between the parties hereto, then in that event, an appraiser shall be appointed as heretofore stated in case of death of one of the parties hereto. After said figure is agreed upon and the figure is adjusted to the assets and liabilities of the partnership at the time this figure is agreed upon, the remaining parties will pay 5% of the agreed figure and the balance in sixty (60) equal monthly installments until said price is paid. The indebtedness will be in the form of promissory notes, series in form, and personally signed by the remaining partners.

[The manner in which the value of the "retiring" partner's interest is to be determined is then set forth.]

In the event the remaining partners do not desire to purchase the interest of the partner that desires to sell, the party desiring to sell, may sell his interest to a third party.

This foregoing paragraph 14 of the Napoli agreement, insofar as the issues involved in this case, is identical to paragraph 14 of the partnership agreement between appellee and appellant, which reads as follows:

Retirement. Either Partner shall have the right to retire from the Partnership at any time. Written notice of intention to retire shall be served upon the other Partner, by registered mail, at the office of the Partnership at least two (2) months prior to the date of proposed retirement. The retirement of either Partner shall have no effect upon the continuance of the business operated by the Partnership and the remaining Partner



shall have the right either to purchase the retiring Partner's interest in the Partnership upon the terms and conditions hereinafter set forth in this Paragraph 14., or to terminate and liquidate the Partnership business pursuant to the provisions of Paragraph 13.

If the Partner not retiring shall be interested in purchasing the ownership interest of the retiring Partner, he shall, within thirty (30) days after having received the written notice of intention to retire, notify the retiring Partner, by registered or certified mail, of the fact that he, the remaining Partner, is interested in purchasing the ownership interest of the retiring Partner. In addition, within the thirty (30) day period, the Partner not retiring shall make arrangements with the Partnership's accountants to perform, as soon as such work may be scheduled by the accountants, an audit of the books and records and the determination of the purchase price, the submission of reports by the Partnership's accountants, the time in which the Partner not retiring shall be required to absolutely elect to purchase or not to purchase, the computation of the amount the retiring Partner shall receive in the year of sale if the remaining Partner shall elect to purchase, the terms of the promissory note to be delivered by the remaining Partner to the retiring Partner, and the security therefor, shall all be in accordance with the provisions hereinabove contained in Paragraph 12. as if the retiring Partner had received an offer to purchase his Partnership interest from another party except as expressly provided in this Paragraph 14. The retiring Partner shall, if the remaining Partner elects to purchase his Partnership interest, deliver to the purchasing Partner such evidence of transfer and sale as the purchasing Partner shall require. Settlement shall be held within ten (10) days after the date upon which the remaining Partner shall finally exercise his option to purchase, if at all.

The cost of legal and accounting services incurred by the Partnership, the remaining Partner or



the retiring Partner, in connection with the computation and documentation above required, shall be borne equally by the Partners.

In the event the remaining Partner does not elect to purchase the interest of the retiring Partner in the Partnership, the Partners shall proceed with reasonable promptness to liquidate the business of the Partnership. The procedure as to liquidation and distribution of the assets or the proceeds of assets of the Partnership business shall be the same as stated in Paragraph 13. hereinabove.

Holding that plaintiff's institution of his action to dissolve the partnership violated paragraph 14 of the Napoli partnership agreement (even if the partnership agreement was construed to be one at will), the New York Supreme Court stated:

It seems clear that paragraph 14 of the partnership agreement in the instant case is "applicable to and consistent with a partnership at will." Plaintiff was, therefore, bound by it. Being bound by it, his unequivocal notice of election "to dissolve" the partnership followed by the institution of this action to enforce his alleged right to do so constituted a breach of the agreement. . . . Having breached the agreement, he is not entitled to a decree of dissolution (Partnership Law, §63, subd. 1(d); §69; 1 Rowley on Partnership [2d ed.], p. 618; cf. Partnership Law, §62). (226 N.Y.S.2d 916) 20/

---

20/ The New York Supreme Court granted defendant's motion for summary judgment on his counterclaim for dissolution and relief under Sec. 69 of the New York partnership law (identical with Section 337 of the D.C. Code). It further ordered the payment to plaintiff of his share of the assets of the partnership less damages caused by his breach of the agreement.

On appeal, the appellate division modified the decision of the Supreme Court only to the extent that it found that

(Cont'd)

The law is clear, therefore, that a party is bound by the partnership agreement into which he has duly entered and cannot secure relief in contravention of such agreement from a court of equity. It is preposterous to hold, as the lower court nevertheless did at pages 6-7 of its memorandum opinion, that the right to breach a partnership agreement, as appellee has done, and thereby secure the "spite-fence" destruction of the partnership business sought by appellee by his complaint, is safeguarded by the Uniform Partnership Act, or that a partnership agreement such as here in issue which seeks to preclude this destruction may not be enforced under this Act. No provision of the Uniform Partnership Act which grants this <sup>21/</sup> remarkable license to appellee is cited by the lower court, and obviously none exists. Thus, contrary to the opinion of the

---

20/ (Cont'd)

the assessment of damages was not warranted because the partnership there in issue, unlike the one herein, was a partnership at will and not for a specific term. 236 N.Y.S.2d 549.

21/ At page 7 of its opinion the lower court held only that --

"...since the parties herein formed their partnership within the confines and requirements of the Uniform Partnership Act, all matters concerning the partnership are governed by the Act, the provisions of which are to be read by implication into the agreement of December 12, 1965."

However, contrary to the lower court's opinion, the Uniform Partnership Act, as adopted in the District of Columbia, specifically

(Cont'd)

lower court, no issue whatever is here presented as to whether the partnership agreement deprives the parties of any rights under the Uniform Partnership Act; and certainly there is no basis upon which to find that under the Uniform Partnership Act, the subject partnership agreement may be breached with impunity, as appellee here seeks to do.

3. The Appointment of the Receiver  
on the Facts Here Presented Con-  
travenes Public Policy.

The granting of the interim receivership relief over a going and prosperous business, as sought by appellee on the basis solely of "irreconcilable differences" is also plainly contrary to public policy. It firstly would establish a precedent for the clogging of the already busy courts with scores of litigations, merely because of "disagreements" between partners, which do not

---

21/ (Cont'd)

provides that the rights and duties of partners in relation to the partnership shall be determined thereunder, "subject to any agreement between them." 41 D.C. Code §317 (emphasis added). Thus, the Pennsylvania Supreme Court has noted that the partnership agreement is the "mutually established law of the partnership." O'Donnell v. McLaughlin, 386 Pa. 187; 125 A.2d 370 (1956). See, also, Thickman v. Schunk, 436 P.2d 542 (Wyo. 1966); Auer v. Wagner, 101 Pitt. L.J. 29 (1950).

affect the rights of third parties or even adversely affect the parties themselves. Secondly, it places a premium upon partners "not getting along," whenever one or the other decides that a court litigation will serve his purposes, and particularly if he feels the need to free himself from the obligations of a partnership agreement into which he has duly entered. In this respect, appellant's October 15, 1970 affidavit shows how readily "irreconcilable differences" can be manufactured or unmanufactured as may suit the whim of a party seeking judicial intervention. Finally, to permit the liquidation of a thriving competitive business, or the appointment of a receiver which would bring about the same result, as requested by appellee herein, is contrary to the important interest of the general public to have such thriving competition maintained,<sup>22/</sup> and not peremptorily eliminated.

---

<sup>22/</sup> It was noted in appellant's October 15, 1970 affidavit, at pages 2-3, that appellee's counsel represents three competitors of the business of the partnership which would be particularly advantaged in having appellant's business liquidated.

B. The Lower Court Erred in Failing to Grant Appellant's Request for Relief Under 41 D.C. Code Section 337.

1. All of the Facts Which Show That Appellant Is Entitled to Section 337 Relief Are Set Forth in Appellee's Complaint.

All of the pertinent facts which indisputably show that <sup>23/</sup> appellant is entitled as a matter of right to the relief which he sought under Section 337 were before the lower court. In fact, they were pleaded and proven in appellee's own complaint. Apparently recognizing this to be the case, appellee in his November 24, 1970 Memorandum in Support of Motion to Dismiss Appeal from Order of the District Court Denying Appellant's Motion for Relief Pendente Lite, filed in this Court, was constrained to mischaracterize his own complaint in several significant respects: First, appellee states at page 1 of this memorandum that his complaint sought a declaratory judgment as to whether appellee and appellant are doing business as partners or

---

23/ Section 337 provides, in pertinent part --

The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so...." (Emphasis added)

"under the aegis of a corporation." Appellee actually sought only a declaration, under both counts 1 and 2 of the complaint (see pages 3, 4 and 8 thereof), that the parties were doing business as partners. No declaratory judgment was requested by appellee anywhere in the complaint that the business be found to be operating "under the aegis of a corporation." Further, at the hearing of the interlocutory motions, before the United States District Court, appellee stipulated that the business was a partnership (see lower court's Memorandum Opinion, p. 1).

Secondly, appellee has indicated at pages 1-2 of his November 24, 1970 memorandum in this Court that the complaint prayed for a declaration as to whether the partnership is one at will or for a specified term, and if the latter, that it be dissolved for cause, pursuant to Section 331 of Title 41 of the District of Columbia Code. Again, no such allegation appears in the complaint. Therein, appellee alleged flatly that the partnership was one at will, which he had an absolute right to dissolve (Complaint, p. 2), and Section 331 is not even mentioned. Moreover, consistent with Section 330, and not 331, dissolution is requested in the complaint solely on the basis of alleged "irreconcilable differences," and not for any of the

<sup>24/</sup>  
reasons set forth in Section 331.

The matters which are actually set forth in the complaint, in contrast to appellee's attempted obfuscation thereof, are here noted because it is crystally clear from the complaint, firstly, that appellee in filing this action unequivocally sought the dissolution of what he believed and later stipulated to be a partnership. Secondly, appellee's partnership "at will" allegation, and the corollary allegation made by appellee in the complaint that he had an absolute right to dissolve the partnership, shows that he did not seek dissolution for cause under Section 331. Contrary to what he now contends is the case, appellee in his complaint

---

<sup>24/</sup> Appellee further alleges in his November 24, 1970, Memorandum at page 2, footnote 1, filed in this Court, that the allegation of Section 330, instead of Section 331, was due to a "typographical error." He does not, however, suggest that the further allegation in his complaint (consistent with his allegation of Section 330 jurisdiction, and not Section 331) that the partnership was one at will, and also the failure to make any allegations to support Section 331 relief, are similarly attributable to "typographical error."



sought dissolution under Section 330, as a matter of right, indicating only that he had "irreconcilable differences" with appellant. Such "differences," however, as shown above, do not, as a matter of law, justify dissolving the partnership -- even if appellee's requested dissolution and liquidation relief were not in contravention of the agreement, which, as also shown above, presents another insuperable obstacle to appellee's success on the merits, regardless of whether the complaint was brought under Sections 330 or 331.

Hence it is plain from appellee's complaint that the filing of his suit for dissolution constituted a breach of the partnership agreement. This is the clear holding of Straus, supra, and Clark v. Allen, 333 P. 2d 1100 (1959) and Napoli v. Domnitch, supra. However, resort to case law is not even necessary to reach the conclusion that the filing of the suit constitutes a breach of the agreement, because it is compelled by the language of the statute itself, 41 D. C. Code Section 330(2) (not discussed by the lower court in its memorandum opinion) which plainly holds that dissolution is caused --

by the express will of any partner at any time. (Emphasis added)

The conclusion that appellee's filing of the suit dissolved the partnership is also consistent with appellee's citation at pp. 5-6 of his November 24, 1970 Memorandum in Support of Appellee's Motion for Summary Affirmance of the Order of the District Court Appointing a Receiver, of the holding in Application of Pivot Punch & Die Corporation, 182 N.Y.S. 2d 459 (Sup. Ct. N.Y. 1959), that --

In addition to the technical rules surrounding a partnership and perhaps from a purely moral point of view, more important, there exists between partners the highest degree of fidelity, loyalty, trust, faith, and confidence. When these characteristics in a partnership cease, then the true partnership ceases... . (182 N.Y.S. 2d 463)

Certainly, a partner who has filed a public suit for dissolution cannot be said to be maintaining vis-a-vis his partner "the highest degree of fidelity, loyalty, trust, faith and confidence," which appellee acknowledges are inherent ingredients of a partnership. The holding that the filing of a suit for dissolution causes a dissolution of the partnership is not, therefore, based upon mere technicality, but upon what in reality happens to the partnership relationship when such action is taken.

The lower court's unsupported refusal to recognize the fact that the filing of appellee's suit caused a dissolution of the partnership was arbitrary and capricious. However, it is apparent that the concern of the lower court in this respect was that a party not be deterred from filing a suit "to dissolve a partnership for cause." (Memorandum Opinion, p. 7) Since, as noted, appellee failed to even allege any legal "cause" upon which dissolution could be granted, and could not in any event prevail upon the merits since the relief which he sought was in contravention of the partnership agreement, the lower court's concern is inapposite. Significantly, in discussing Clark v. Allen, supra, at pp. 5-6 of its memorandum opinion, the lower court apparently agrees that the filing of the suit would be a dissolution if after hearing it was shown that the suit was "groundless." Herein, however, it is apparent from the complaint that the suit is groundless. Hence there is no need to wait until after hearing to reach this conclusion, or the conclusion that the partnership has been dissolved by the filing of the complaint.

In these circumstances, the only remaining issue to be decided in determining whether appellee dissolved the partnership wrongfully in contravention of the agreement, thereby

entitling appellant to the Section 337 relief which he sought, is whether the partnership agreement is for a specific term or one at will.<sup>25/</sup> Resolution of this issue presents no difficulty, even though the lower court arbitrarily and erroneously failed to decide it. Indeed, since appellee attached the partnership agreement to the complaint and alleged that the business of the partnership was being conducted pursuant thereto,<sup>26/</sup> the determination of whether the partnership is one at will or for a specific term presents only a question of law. And that the partnership agreement is one for a definite term is self-evident from the agreement. Thus Paragraph 2 of the Partnership Agreement states: "Term of Partnership. The Partnership has heretofore commenced and shall continue until terminated as herein provided." (Emphasis supplied) The only means

---

<sup>25/</sup> Appellee himself recognized at page 10 of his September 21, 1970 memorandum submitted to the lower court that appellant is entitled to the relief which he has sought if the partnership was one for a definite term. Appellee there stated --

Unless the Court agrees [with defendant's contention that the partnership was for a definite term], defendant is clearly not entitled to have the provisions of section 337 applied to exclude plaintiff from the operation of the business and to ask for an injunction severely circumscribing plaintiff's future conduct.

<sup>26/</sup> Complaint, par. 3., pp. 1-2.

of terminating the partnership provided for in the agreement is by (a) sale of interests;<sup>27/</sup> (b) dissolution by mutual consent;<sup>28/</sup> (c) retirement of a partner;<sup>29/</sup> (d) death of a partner;<sup>30/</sup> or (e) incompetency of a partner.<sup>31/</sup> In executing the partnership agreement, the parties clearly intended that the partnership was to continue until one of the foregoing five specific events occurred. Conversely, the parties clearly agreed that the partnership was not to be terminated by an event not set forth in the agreement, including the unilateral dissolution of the partnership which appellee has caused. In fact, the provision by the parties that the agreement was to be terminated by "mutual consent," under the doctrine of inclusio unius est exclusio alterius, expresses the clearest possible intent that the partnership was not to be terminated unilaterally. In the lower court appellant cited two cases which confirmed that a partnership for a definite term is here at issue.

---

<sup>27/</sup> Exhibit A to Complaint, par. 12, pp. 4-8.

<sup>28/</sup> Id., par. 13, pp. 8-9.

<sup>29/</sup> Id., par. 14, pp. 9-11

<sup>30/</sup> Id., par. 15, pp. 11-13.

<sup>31/</sup> Id., par. 17, pp. 14-15.

The first case, Dobbins v. Tatem, 25 Atl. 544 (N.J. 1892), involved a partnership agreement which provided that if one named partner survived the other the entire interest in the business would vest in him upon the payment of a certain sum to the heirs of the other, and if the other named partner survived, the entire interest in the partnership would vest in such surviving partner absolutely without any payment to the heirs. The court held that this was a partnership for a definite term, and not a partnership at will, which could be unilaterally dissolved by either partner by notice to the other. The reasoning of the court, which is applicable to the instant case, was that while the term of the partnership was not fixed or specific as to number of years, it was fixed and certain by events which would inevitably transpire in the course of time. (25 Atl. at 545)

The second authority, in which Dobbins v. Tatem, supra, was followed, is Aiman v. Aiman, 61 Montg. Co. L.R. 51 (Pa. 1944) decided under the Uniform Partnership Act. In Aiman, the partnership agreement provided that the partnership "shall continue, notwithstanding the sale of the interest of a partner, as provided for above, until dissolved by mutual consent of the partners, or by the death of one of the partners." In addressing the question of whether the foregoing language of the agreement

created a partnership at will, or for a definite term, the court found --

Of course under the Uniform Partnership Act of March 26, 1915, P.L. 18, §31 (4), death of a partner would dissolve the partnership. But the agreement here not only implies that death will dissolve the firm, but expressly provides that the partnership is to continue until the death of a partner (or termination by mutual assent) which is an entirely different thing.

The only case we have been able to find on this subject is that of Dobbins v. Tatem, 25 A. 544 (1892), in which it was held that where a partnership agreement provided that if one partner survives the entire interest in the business would vest in him upon payment of a certain sum to the heirs of the other, and that if the other partner should survive such interest should become his absolutely, the partnership was not one at will, and could not be dissolved by simple notice by one partner to the other. The reasoning of the court in that case, which is applicable in the instant case, was that while the term was not fixed or specific as to the number of years, yet it was fixed and certain by events which would inevitably transpire in the course of time. It would not be contended that a partnership formed for the accomplishment of a particular purpose, though no time limit is specified, is a partnership at will. If for example a partnership was formed for the purpose of developing and selling a tract of real estate, the partnership would continue until that purpose was accomplished. Depending on economic and other conditions, such purpose might conceivably require a much longer period of time. Certainly in such case, the duration of the partnership is no more definitely fixed or certain than one which is to continue so long as both partners shall live.



We therefore conclude that the partnership before us was not one at will, and consequently not one which may be dissolved by one partner by mere notice such as the bringing of this bill. We do not quarrel with the authorities cited by plaintiff in support of her contention that this is a partnership at will, but we do not feel they are applicable in the face of the express terms of this agreement. (61 Montg. Co. L.R. at 55) <sup>32/</sup>

Since the partnership in the instant case was for a definite term, and since as shown above appellee could not as a matter of law secure an equitable dissolution thereof by the court, appellee's premature dissolution by the filing of his complaint constituted a wrongful termination which entitled appellant as a matter of right under 41 D.C. Code Section 337 to the relief which he sought. The Straus case, supra, decided by the Supreme Court of Minnesota under the identical provisions of the Uniform Partnership Act, and involving identical facts, confirms appellant's right to the Section 337 relief which he had sought. The lower court's attempt to distinguish Straus at pages 4-5 of its opinion is patently unavailing and, if anything, demonstrates even more clearly why its doctrine should be applied to the subject facts. Thus, the lower court

---

<sup>32/</sup> See also, Drasker v. Sorenson, 63 N.W. 2d 255 (1954); Bates v. McTammany, 76 P. 2d 513 (Cal. 1938); Mervyn Inv. Co. v. Biber, 194 P. 1037 (Cal. 1921); and Owen v. Cohen, 119 P. 2d 713 (Cal. 1941).

seeks to brush aside the finding in Straus that the institution of the suit caused an immediate dissolution as being "dictum." But it is plain from the Straus opinion that this finding was basic and even a jurisdictional prerequisite to the court's action in that case. Had the court been unable to find that the partnership had been dissolved, it would not have been able to affirm the granting of the Section 337 relief sought by the defendant therein. (See 94 N.W. 2d at 685-686)

Even more interesting is appellee's attempt to distinguish Straus at page 10 of its November 24, 1970 Motion To Dismiss Appeal From Order of The District Court Denying Appellant's Motion For Relief Pendente Lite, filed in this Court. Therein, appellee states --

In Apellant's second case, Straus v. Straus, a careful reading reveals that the Minnesota Supreme Court was not confronted with the issue of whether a partnership is wrongfully dissolved by the mere filing of a complaint seeking a decree of dissolution for cause. Plaintiff Straus did not proceed under [Section 331] for a premature dissolution for cause, because he relied on the theory that his partnership was one "at will" or for "a specified term" which had expired. It was in this posture that the Court found that plaintiff's written notice or the filing of his suit was an expression of will to dissolve the partnership and an attempt to force a confirmation that the partnership had ended.

This attempt to distinguish Straus explains more fully why appellee, as shown above, now seeks to pretend, con-

trary to his own complaint, that this document of record did not allege that a partnership "at will" was involved, and that dissolution under Section 331, instead of Section 330, was requested. Like the plaintiff in Straus, appellee "did not proceed under [Section 331] for a premature dissolution for cause, because he relied on the theory that his partnership was one 'at will'...." It is apparent that appellee fully comprehends that by virtue of the allegations indisputably set forth in the complaint (but which he now wishes to disown) that this case falls squarely within Straus.<sup>33/</sup>

---

<sup>33/</sup> However, appellee does not presently find himself within Straus and subject to the penalty provisions of the Uniform Partnership Act because of inadvertence. At the oral argument before the lower court on October 15, 1970, where all of the pertinent issues of law were fully aired, appellant offered to dismiss its Section 337 counterclaim with prejudice, if appellee within five days of that date would notify the court of his election to retire under the agreement. This offer was repeated in a supplemental memorandum of that same date, filed by appellant, at pp. 11-12 thereof.

Appellee refused to accept this offer, and elected instead to continue to prosecute his suit for dissolution and liquidation of the partnership, thus demonstrating with full knowledge of the liability he was incurring his persistent intent to override and contravene the partnership agreement.

2. The Lower Court, in Denying Appellant's Request for Immediate Section 337 Relief, Has Erroneously, Arbitrarily and Capriciously Read an Important and Here Indispensable Right Out of the Uniform Partnership Act.
- 

In denying appellant's request for Section 337 relief, the lower court has erroneously, arbitrarily, and capriciously read out of the Uniform Partnership Act an important and here indispensable right granted by the Congress to be exercised in just the circumstances here presented where a partnership has been wrongfully dissolved in contravention of the partnership agreement -- the right to assume control over and continue the business of a partnership which has been wrongfully dissolved. By breaching the partnership agreement, appellee, by virtue of Section 337, has conferred upon appellant the right to carry on the business of the partnership, subject to the payment to appellee of his share of the net assets of the business, less the value of the good will, as provided for in Section 337.

This Section 337 right has been conferred by the legislature, as well as the drafters of the Uniform Partnership Act, because it was properly recognized that an action at law for damages alone is not an adequate remedy for a partner who has had the entity through which his life-work has been conducted peremptorily destroyed. It was also recognized that the right

to continue the business must be immediately granted and cannot await a full evidentiary hearing. Thus, Section 337 holds that the wronged partner may post bond for the value of the breaching partner's interest, pending determination of the damages sustained by the wronged partner, which damages are to be subsequently deducted from the amount actually paid to the breaching partner. 41 D.C. Code §337(2)(b) and (c). Appellee's argument that Section 337 applies only after there has been a full evidentiary hearing is plainly without merit. (See Appellee's November 24, 1970 Motion to Dismiss Appeal from Order of the District Court Denying Appellant's Motion for Relief Pendente Lite, p. 15). Where, as is the case herein, it is apparent from the pleadings that a party is entitled as a matter of law to Section 337 relief, it would be pointless and unnecessarily injurious to withhold relief until an evidentiary hearing could be held. Even if it were not as conclusively apparent, as it is in this case, that a party is entitled to Section 337 relief, the Straus case, supra, shows that such relief should nevertheless <sup>34/</sup> be granted pendente lite.

---

<sup>34/</sup> As noted by the lower court at page 5 of its memorandum opinion, the Supreme Court of Minnesota affirmed the granting of Section 337 relief pendente lite, even though it left open for determination on the merits of the case whether the partnership was one at will or for a definite term and "whether the

The importance of granting immediate Section 337 relief, which as noted the legislature in its wisdom granted as a matter of right, and not even as a matter of judicial discretion, cannot be here over-emphasized. Appellee has destroyed the partnership entity by his act of dissolution, and relief under Section 337 is imperatively required in order to permit the business of the partnership to continue operations. As noted by appellant in his affidavit of September 9, 1970, such relief is required in order to be able to meet customer requirements; assure the continued employment of long-standing and valuable employees; protect valuable franchises and distributorships; as well as enter into leases for premises for the business to occupy. Moreover, the fact that appellant was entitled, as a matter of law, to the Section 337 relief which he requested is but another reason why the lower court erred in granting the mutually exclusive receiver-

---

34/ (Cont'd)

plaintiff's action in filing the suit caused a wrongful dissolution of the partnership, thereby permitting a permanent application of the relief already granted on an interim basis by the trial court." Since both of these questions can in this proceeding be decided on the basis of the pleadings, a stronger case for Section 337 pendente lite relief is here presented than even in Straus. Indeed, the only question which actually requires an evidentiary hearing herein is the extent of damages to which appellant is entitled under his counterclaim.

ship relief requested by appellee. The arguments which appellee has made in this respect, that "the device of a receiver was by far the most equitable form of interim relief available and did not require divesting either party of his interest in the business";<sup>35/</sup> and that the Section 337 relief is not equitable because it "does not perpetuate the status quo so as to preserve equally the rights of both parties while the case is pending before the District Court,"<sup>36/</sup> are not only ill-founded but also irrelevant. The issue here presented is not which relief will best preserve the status quo. Section 337 expressly provides, in the instant circumstances, that the status quo shall not be preserved.<sup>37/</sup> In any event, contrary to appellee's own argument, the appointment of the receiver disturbs the status quo even more than the granting

---

<sup>35/</sup> See, e.g., appellee's November 24, 1970 Opposition to Motion for Stay of Order of the District Court Appointing a Receiver, p. 3.

<sup>36/</sup> Appellee's November 24, 1970 Memorandum in Support of Motion to Dismiss Appeal from Order of the District Court Denying Appellant's Motion for Relief Pendente Lite, p. 14.

<sup>37/</sup> Dolenga v. Lipka, supra, and Wrenn v. Wrenn, supra, cited by appellee, do not as he contends, indicate that an "impartial receiver is to be preferred over permitting a defendant-partner, pursuant to the provisions of Section 337 to alone continue the business of the partnership." Both of these cases involved partnerships at will, and therefore no claim was made therein by the defendants that they had a statutory Section 337 right to continue the business of the partnership as against a receiver.



of Section 337 relief, since both partners, and not just one partner, are thereby effectively divested, in favor of the receiver, of their control of the partnership business.

Because of the disastrous effect which the divestiture of both partners by a receiver has upon a going and prosperous business, the interim relief requested by appellant, rather than the relief requested by appellee, has been recognized in similar circumstances to be the only appropriate remedy. Thus, in both Straus, supra, and also in Phillip v. Von Raven, et al., 57 N.Y.S. 701 (Sup.Ct. 1899) (a case which was initially cited below by appellee), "irreconcilable differences" were alleged. (See 94 N.W.2d 686 and 57 N.Y.S. 702, respectively). Yet it was recognized that the disastrous relief of a receiver would not serve the interest of either party. Instead, the court granted pendente lite the Section 337 relief requested by appellant <sup>38/</sup> herein.

The granting of the Straus and Von Raven relief, rather than the appointment of a receiver, is here required, not only because it permits the good will of the business to be preserved pending adjudication of the merits, but also because it fully

---

<sup>38/</sup> Von Raven was decided under the predecessor statute to the Uniform Partnership Act. However, the statute which was involved was closely akin to Section 337 of the Uniform Partnership Act. See 57 N.Y.S., pp. 702-703.

protects, by virtue of the bond which appellant is willing to post, appellee's interest in the other assets of the partnership. The granting of appellee's motion, on the other hand, as the lower court has done, irrevocably destroys the substantial business of the partnership prior to an adjudication on the merits and forecloses any opportunity for appellant to continue same. In addition, it is extremely doubtful that any amount close to the full value of the physical assets, or any value for the good will, could be secured upon a dissolution sale, not to mention the additional expenses which such a receivership would impose upon the business. Hence, the granting of the receivership penalizes both appellant and appellee and effectively forecloses an adjudication of the merits of the controversy by this Court of the orders of the court below. The court granted pendente lite the Section 337 relief requested by appellant.

38/ CONCLUSION

herein.

Accordingly, for all of the foregoing reasons, and on the granting of the Straus and Von Raven relief, rather than the appointment of a receiver, is here required, not only on the basis of the cited authorities, appellant respectfully submits that this Court should reverse the lower court's order because it permits the good will of the business to be preserved by appointing the receiver of appellant's and appellee's partnership pending adjudication of the merits, but also because it nullifies the business and its order denying the Title 41 D.C. Code

38/ Von Raven was decided under the predecessor statute to the Uniform Partnership Act. However, the statute which was involved was closely akin to Section 337 of the Uniform Partnership Act. See 57 N.Y.S., pp. 702-703.

Section 337 relief sought by appellant.

Respectfully submitted,

JACOB P. BILLIG  
NORMAN C. BARNETT  
TERRENCE D. JONES

1108 16th Street, N. W.  
Washington, D. C. 20036  
628-4717

December 28, 1970

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served in person  
a copy of the foregoing brief upon Messrs. David G. Bress and  
Thomas C. Green, 1700 Pennsylvania Avenue, N.W., Washington,  
D.C., counsel for appellee.

---

JACOB P. BILLIG  
1106 16th Street, N. W.  
Washington, D. C. 20036

Attorney for Appellant

Washington, D.C.  
December 28, 1970

UNITED STATES DISTRICT COURT  
FOR DISTRICT OF COLUMBIA

Burton M. Cooper )

Plaintiff )

v. )

Leslie A. Isaacs )

Defendant )

2639-70

Civil Action No. \_\_\_\_\_

COMPLAINT

(For Declaratory Judgments, Equitable Relief, etc.)

1. The claims for relief herein are for declaratory judgments pursuant to Title 28, United States Code, Section 2201, and for equitable relief, including winding up and liquidation of a partnership known as Lesco Associates existing between the plaintiff Burton M. Cooper and defendant Leslie A. Isaacs, pursuant to Title 41, District of Columbia Code, Section 330, and the dissolution of "Lesco Associates, Inc.", an alleged corporation, pursuant to Title 29, District of Columbia Code, Section 931b. The amount in controversy exceeds \$10,000 exclusive of interest and costs.

Count 1

(Dissolution of Partnership)

2. The jurisdiction of this Court is as averred in paragraph 1 hereof.

3. The plaintiff Burton M. Cooper and the defendant Leslie A. Isaacs are copartners doing

business in the District of Columbia under the name and style of "Lesco Associates" pursuant to a partnership agreement entered into between them on December 11, 1965, a copy of which is attached hereto as exhibit A and incorporated herein by reference. The business of said partnership involves the sale and distribution of janitorial supplies. Because of irreconcilable differences which have arisen and persisted between said partners so that they have been and are unable to agree on policies of the business and their respective roles in it, and because of their inability to resolve such differences plaintiff Cooper has given notice to defendant Leslie A. Isaacs of his intention to file this action to effectuate a dissolution of said partnership and to have its business wound up and liquidated according to law by paying all creditors and then dividing any surplus between them.

4. A justiciable controversy exists between said partners in the following respects requiring adjudication by this court:

(a) The plaintiff Cooper contends that inasmuch as said partnership was neither formed for the purpose of a particular undertaking nor for a specified duration it is presently a partnership at will, and that accordingly he has an absolute right to dissolve said partnership, whereas the defendant maintains that the partnership is not in existence because of defendant's claim that it was terminated on September 17, 1969 when a charter was issued for a corporation known as Lesco Associates, Inc., which

allegedly succeeded to the business of said partnership as more particularly set forth in Count 2.

(b) The plaintiff Cooper contends that as a partner he has an absolute right to dissolve the partnership and wind up its affairs in liquidation, whereas the defendant Leslie A. Isaacs contends that said plaintiff does not have that right by reason of his contention that the partnership ceased to exist on September 17, 1969 when the aforesaid charter was issued.

(c) The plaintiff Cooper contends that disagreements between the said partners on matters of policy in operating their business has caused and will cause irreparable damage to said partnership business and to the plaintiff individually, whereas the defendant contends that he is satisfied with the performance of the business and further that the partnership is not in existence for the reason stated above.

WHEREFORE, plaintiff prays for a judgment for the following relief:

(A) That the Court enter a judgment declaring that the plaintiff Burton M. Cooper and the defendant Leslie A. Isaacs are partners engaged in business as Lesco Associates, a partnership, and that either party has the right to dissolve the partnership, and further that by judgment of this Court said partnership be declared to be dissolved and that it be ordered that its affairs be wound up under the supervision of this Court.

(B) That the Court appoint a receiver to effect the winding up of the affairs of said partnership including its final termination.

(C) That the Court grant relief to the plaintiff pendente lite and permanently, including appointment of a receiver for the purposes stated in paragraph B.

(D) And for such other relief as may be meet and just.

C. at 2

(Dissolution of a Corporation)

5. The jurisdiction of this Court is as averred in paragraph 1 hereof.

6. On September 17, 1969 a charter was issued by the District of Columbia for a corporation known as "Lesco Associates, Inc.". Said corporation was created to succeed in due course to the business of the aforesaid partnership known as Lesco Associates, referred to in Count 1 hereof. It was the contemplation of the aforesaid partners, Burton M. Cooper and Leslie A. Isaacs, that they would ultimately transfer their interests in said partnership, exclusive of Accounts Receivable, to said corporation in exchange for all the common capital stock of said corporation to be distributed between them in the same proportions in which they participated as partners. Notwithstanding said contemplation, because of their failure to agree upon the terms of formation of said corporation the plaintiff Burton M. Cooper and the defendant Leslie A. Isaacs never conveyed to said corporation any assets of the partnership, and further the plaintiff Cooper and the defendant Isaacs, and their respective wives, as the directors designated by the incorporators of said corporation never held an initial meeting of



the Board of the Directors and consequently no officers have ever been elected nor their compensation fixed, nor by-laws adopted, nor the issuance of stock authorized in consideration for the conveyance of any assets of said partnership, nor has any other action been taken on any corporate matter, with the effect that said corporation has not succeeded to the business of the aforesaid partnership, and it has never commenced business pursuant to the Sixth Article of Incorporation and Section 921d of Title 29 of the District of Columbia Code.

7. A justiciable controversy exists between the parties requiring adjudication by this Court in that plaintiff Cooper contends that said corporation never succeeded to the business of the partnership, heretofore referred to as "Lesco Associates", and that said corporation never commenced business as set forth particularly in paragraph 6 hereof, whereas defendant Isaacs claims that the aforesaid corporation succeeded to the business of said partnership on September 17, 1969 when a charter was issued to "Lesco Associates, Inc." and further that on that date he and plaintiff Cooper ceased doing business as partners and thereafter conducted business under the aegis of said corporation.

8. Contrary to plaintiff's claim in paragraph 6 hereof, should this Court find that the aforesaid corporation has succeeded to the business of said partnership and that Burton M. Cooper is a shareholder of said corporation, plaintiff Burton M. Cooper, as a shareholder, alternatively contends that said corporation is threatened with irreparable injury to a degree necessitating dissolution by virtue

of unbreakable deadlock between himself and his wife and the defendant Isaacs and his wife, as directors designated by the incorporators in the following respects:

(a) There has developed such serious disagreement, acrimony and discord between the plaintiff Burton M. Cooper and the defendant Leslie A. Isaacs that not only have said individuals ceased to communicate with each other in respect to the conduct of business, but also the plaintiff Cooper has been physically intimidated by the defendant Isaacs to a degree engendering in plaintiff Cooper immediate apprehension of bodily harm.

(b) Plaintiff Burton M. Cooper and his wife, and defendant Leslie A. Isaacs and his wife, as directors designated by the incorporators of said corporation, have not and will not attend together any meeting of directors, thereby creating an impasse in the management of the affairs of said corporation and preventing the conduct of business.

(c) Inasmuch as the designated directors of said corporation will not attend together any board meeting no officer has been elected and authorized to enter into a lease for the premises on which the business is conducted and, therefore, said corporation has no status as a tenant, and, instead, said partners, heretofore referred to in Count 1, have continued in possession of the premises as tenants at sufferance, all of which jeopardizes the continuation of operations and threatens irreparable injury to said corporation, and the business of said corporation is further imperiled because the discord between the plaintiff

Burton M. Cooper and the defendant Leslie A. Isaacs makes it extremely unlikely that agreement can be reached on another location for the conduct of operations.

(d) Plaintiff Burton M. Cooper contends that the irreconcilable disagreement and differences which exist between himself and the defendant Leslie A. Isaacs have operated to limit said corporation's share of the relevant market and that the continuing effect of this discord will produce a drastic diminution of the profits of said corporation and will cause said corporation to become less efficient and suffer irreparable financial injury.

(e) Contrary to plaintiff Cooper's claim in paragraph 6 hereof, should this Court find that said corporation issued common stock to plaintiff Burton M. Cooper and that Burton M. Cooper is a shareholder of said corporation, then plaintiff Cooper contends that based on the allegations contained in subsections (a) (b) (c) and (d) of this paragraph, which are incorporated herein by reference, the heretofore described threatened irreparable injury to said corporation from the discord and deadlock between the directors designated by the incorporators of said corporation cannot be alleviated by its shareholders, because the plaintiff Burton M. Cooper and the defendant Leslie A. Isaacs are the only and equal shareholders of said corporation.

WHEREFORE, plaintiff prays for a judgment for the following relief:

(A) That the Court enter a judgment declaring that notwithstanding the issuance of a charter to a corporation known as "Lesco Associates, Inc." said corporation never received any assets of the aforesaid partnership by conveyance from the plaintiff Burton M. Cooper and the defendant Leslie A. Isaacs, and that said corporation has never succeeded to the business of said partnership and has never commenced the conduct of business.

(B) In the alternative if this Court should fail to grant relief under paragraph A, that the aforesaid corporation be dissolved on grounds that the directors are deadlocked in the management of said corporation's affairs and the shareholders are unable to break the deadlock and that irreparable injury to said corporation is threatened by reason thereof.

(C) That the Court appoint a receiver to effect liquidation of said corporation.

(D) That the Court grant relief to the plaintiff pendente lite and permanently, including appointment of a receiver for the purpose stated in paragraph (c).

(E) And for such other relief as may be meet and just.

GINSBURG, FELDMAN and BRESS

By David A. Bress  
David G. Bress

By Thomas C. Green  
Thomas C. Green

ATTORNEYS FOR PLAINTIFF

1700 Pennsylvania Avenue  
Washington, D. C. 20006

I, Burton M. Cooper, plaintiff herein, being first  
duly sworn according to law do hereby depose and say  
that I have read the allegations of fact contained  
in the complaint filed herein and that said facts  
are personally known by me to be true.

Burton M. Cooper  
Burton M. Cooper  
Plaintiff

Subscribed and sworn to before  
me this 3rd day of September, 1970.

Marlene R. Hammond  
Notary Public

My Commission Expires Dec. 31, 1974

LESCO ASSOCIATES  
PARTNERSHIP AGREEMENT

---

THIS AGREEMENT OF PARTNERSHIP made and entered into the 11 day of December, 1965, by and between BURTON M. COOPER and LESLIE A. ISAACS, both of the State of Maryland (the parties being hereinafter collectively referred to as the "Partners").

WHEREAS, Cooper and Isaacs are carrying on a business as Partners, and

WHEREAS, Cooper and Isaacs desire to set forth the terms and conditions of their Partnership, in writing.

NOW, THEREFORE, the parties do hereby agree as follows:

1. Name and Business. The parties do hereby acknowledge that they have formed a Partnership under the name of "LESCO ASSOCIATES" and are conducting a business consisting of the production and/or sale of janitorial supplies and allied products. The principal office of the business is currently and shall be located in the City of Washington, District of Columbia, until such time as the Partners shall otherwise agree.
2. Term of Partnership. The Partnership has heretofore commenced and shall continue until terminated as herein provided.
3. Capital. The Partners acknowledge that, to date, capital contributions to the Partnership have been equal and any and all additional capital which may be required by the Partnership, from time to time, shall be contributed equally by the Partners.

A separate capital account shall be maintained for each Partner and said capital accounts shall be maintained at all times in the proportion in which the Partners share in the profits and losses of the Partnership, unless the Partners shall mutually otherwise agree, in writing.

4. Profits and Losses. The net profits and losses of the Partnership shall be divided, credited and/or borne equally between the Partners.

No additional share of profits shall inure to either Partner by reason of his capital account being, from time to time, in excess of the capital account of the other.

5. Salaries and Drawings. Neither Partner shall receive any salary for services rendered to the Partnership except as may be specifically herein provided or as this Agreement may be amended by a written Addendum hereto and made a part hereof.

Each Partner shall, however, be entitled to draw from the Partnership an agreed amount per week or per month, as the case may be; provided, however, that such draw shall be equal, except for costs of hospitalization insurance and/or other medical coverage for which the Partnership shall pay as hereinafter provided, and except as otherwise agreed in writing by the Partners.

As a part of the draw of the respective Partners, the Partnership shall pay for such hospitalization and other medical insurance as the Partners shall agree to carry for the benefit of themselves and their respective families. To the extent the Partners shall carry life insurance on the lives of each other, the cost of premiums with respect to such policy or policies shall be deducted from the draw of that Partner who is the owner of such policy or policies.

6. Interest. No interest shall be paid on the initial capital contributions to the capital of the Partnership made by the Partners or on any



subsequent contributions of capital.

7. Loans. Any Partner may, from time to time, advance moneys to the Partnership as loans, and if any Partner shall advance to the Partnership, as loans, a sum or sums of money, such fact shall be duly recorded on the books and records of the Partnership as a loan and not as a contribution to capital. A Partner advancing moneys to the Partnership as a loan shall be immediately entitled to be issued a promissory note made payable to him by the Partnership and executed on behalf of the Partnership by both Partners. The terms and conditions of said promissory note or notes, including maturity date, interest rate, etc., shall be subject to the approval of both Partners, and the fact that such promissory note or notes is, or are, issued, duly executed by both Partners shall signify their consent to the terms and conditions contained therein.

8. Partnership Expenses. In addition to those expenses incurred by the Partnership in connection with the operation of its business, the Partnership shall reimburse or bear the cost of expenses incurred by the respective Partners in connection with the business of the Partnership. The Partners shall determine procedures necessary and the documentation to be supplied to the Partnership at such time or times as a Partner may request the Partnership to reimburse him or bear the cost of a business expense incurred personally by him.

9. Management, Duties and Restrictions. The Partners shall have equal rights in the management of the Partnership business, and each Partner shall devote his entire time to the conduct of the business. Neither Partner shall, without the consent of the other Partner, endorse any note, or act as an accommodation party, or otherwise become surety for any

subsequent contributions of capital.

7. Loans. Any Partner may, from time to time, advance moneys to the Partnership as loans, and if any Partner shall advance to the Partnership, as loans, a sum or sums of money, such fact shall be duly recorded on the books and records of the Partnership as a loan and not as a contribution to capital. A Partner advancing moneys to the Partnership as a loan shall be immediately entitled to be issued a promissory note made payable to him by the Partnership and executed on behalf of the Partnership by both Partners. The terms and conditions of said promissory note or notes, including maturity date, interest rate, etc., shall be subject to the approval of both Partners, and the fact that such promissory note or notes is, or are, issued, duly executed by both Partners shall signify their consent to the terms and conditions contained therein.

8. Partnership Expenses. In addition to those expenses incurred by the Partnership in connection with the operation of its business, the Partnership shall reimburse or bear the cost of expenses incurred by the respective Partners in connection with the business of the Partnership. The Partners shall determine procedures necessary and the documentation to be supplied to the Partnership at such time or times as a Partner may request the Partnership to reimburse him or bear the cost of a business expense incurred personally by him.

9. Management, Duties and Restrictions. The Partners shall have equal rights in the management of the Partnership business, and each Partner shall devote his entire time to the conduct of the business. Neither Partner shall, without the consent of the other Partner, endorse any note, or act as an accommodation party, or otherwise become surety for any

person. Without the consent of the other Partner, neither Partner shall, on behalf of the Partnership, borrow or lend money, or make, deliver or accept any commercial paper, or execute any mortgage, bond or lease, or purchase or contract to purchase, or sell or contract to sell any property for or of the Partnership other than the type of property bought and sold in the regular course of its business. Neither Partner shall, except with the consent of the other Partner, pledge, mortgage, hypothecate or otherwise encumber his share in the Partnership or its capital assets or property, or enter into any loan or security agreement as a result of which any other person, partnership or corporation shall be secured by such Partner's interest in the Partnership, or do any act detrimental to the business interests of the Partnership, or which would make it impossible or unduly burdensome to carry on the ordinary business of the Partnership.

10. Banking. All funds of the Partnership shall be deposited in its name in such checking account or accounts as shall be designated by the Partners. All withdrawals therefrom shall be made upon checks, drafts or orders signed by both Partners, except as otherwise agreed.

11. Books of Account. The Partnership books shall be maintained at the principal office of the Partnership and each Partner shall at all times have access thereto. The books shall be kept on a calendar year or fiscal year basis, as the Partners may determine to be appropriate and audits shall be made, from time to time, by a firm of accountants mutually agreed upon by the Partners.

12. Sale of Interest in the Partnership. If a Partner shall receive a bona fide written offer to purchase his interest in the Partnership

and shall desire to sell his interest in the Partnership in accordance with the terms and conditions of the written offer, said Partner (the "Offering Partner") shall first forward to the other Partner, by registered mail, a notice of his intention to sell and shall attach to said notice a true copy of the written offer received by him.

Within three (3) days after the receipt of the above referenced notice, the Partner receiving such notice shall notify the Partnership's accountants and shall arrange for said accountants to perform, as soon as such work may be scheduled by the accountants, an audit of the books and records. The function of the accountants shall be to determine the book value of the Offering Partner's interest and in the event of a dispute between the Partners as to the value of any assets, the Partnership's accountants shall determine such value which will be binding upon both of the Partners, but in any event, in computing the book value of the Offering Partner's interest, the accountants shall disregard the method of depreciation of assets used by the Partnership and shall recompute the book value of depreciable assets on a straight line basis from the date of purchase to the date of audit and shall, in addition, disregard any adjustments made to depreciable assets of the Partnership because of any allowances for bonus depreciation or investment credit as prescribed by the Internal Revenue Code of 1954. As soon as the Partnership's accountants have determined the book value of the Offering Partner's interest, they shall add thereto an amount equal to one-half (1/2) of the gross profit realized by the Partnership from all operations for the preceding six (6) months prior to the month in which the audit is performed, it being agreed by and between the Partners that this additional amount shall be that portion of the good will of the Partnership attributable to the

#### Offering Partner's interest.

At such time as the Partnership's accountants shall complete their audit report, they shall submit the same, in writing, to both of the Partners and for a period of fourteen (14) days after the audit report shall have been received by the Partners, the Partner who shall have received the notice of intention to sell shall have the absolute right and option to purchase the interest of the Offering Partner for an amount equal to the lesser of the following:

- A. The amount offered to be paid to the Offering Partner by the purchaser whose written offer to purchase was attached to the notice of intention to sell forwarded by the Offering Partner to the remaining Partner as prescribed hereinabove in this Paragraph 12., or
- B. The amount at which the Offering Partner's interest shall have been valued pursuant to the written audit report prepared by the Partnership's accountants and submitted to the Partners in accordance with the provisions hereinabove contained in this Paragraph 12.

In the event the Partner who shall have received the notice of intention to sell shall elect, within the prescribed fourteen (14) day period to purchase the Partnership interest of the Offering Partner, then, notwithstanding any terms of payment contained in the written offer to purchase as received by the Offering Partner from an outside party, the remaining Partner shall make payment for the Offering Partner's interest in the Partnership in the following manner, whether the purchase price shall be that price in A. or B. above:

- A. The Partnership's accountants shall compute, in dollars, that portion of the applicable purchase price which the Offering Partner may receive in the year of sale in order to qualify for "installment sale" reporting method as contained in the Internal Revenue Code of 1954, if such provision shall still be in effect.
- B. After determining such amount, the accountants shall then divide the same by the number of full calendar

months remaining in the year of sale and shall advise the Partners of the amount of dollars per month which the Offering Partner shall be permitted to receive over the full remaining calendar months of the year of sale.

- C. The Partner electing to purchase the Offering Partner's interest pursuant to the foregoing, shall deliver to the Offering Partner a promissory note in negotiable form and executed by the purchasing Partner and his spouse, in an amount equal to the full purchase price as established hereinabove. Said promissory note shall provide that the purchasing Partner shall pay to the Offering Partner, commencing on the first day of the next full calendar month, and continuing with the first day of each following calendar month through December of any calendar year, a payment of principal equal to that amount determined by the Partnership's accountants pursuant to B. above, plus interest at the rate of six (6%) percent per annum on the unpaid balance. The purchasing Partner shall not be allowed to make any prepayment of principal and/or interest in the year of sale except with the consent of the Offering Partner, but the purchasing Partner shall be granted the right to make prepayments in any amount and at any time after the calendar year in which the sale shall take place, without penalty.

The promissory note shall provide that as of January 1 of the calendar year next following the year of sale, the purchasing Partner shall pay to the Offering Partner a lump sum principal payment (plus interest at the rate of six (6%) percent per annum on the unpaid balance), arrived at by dividing the total purchase price by twenty-four (24); then multiplying the result of said division by the number of full calendar months over which payments were to be made by the purchasing Partner in the year of sale, and then subtracting therefrom the dollar amount of principal payments actually made by the purchasing Partner to the Offering Partner pursuant to said promissory note in the year of sale. In the event that the payments actually made by the purchasing Partner to the Offering Partner in the year of sale shall, in total, exceed the final amount arrived at in the above computation, then the purchasing Partner shall not be required to make any lump sum principal payment on January 1 of the next full calendar year following the year of sale. The promissory note shall also provide that as of January 1 of the next full calendar year following the year of sale, the remaining principal balance of the promissory note, less the amount of any lump sum principal payment made on said January 1, if any, shall be payable in equal and consecutive monthly installments, plus interest at the rate of six (6%) percent per annum on the unpaid balance, the number of months of such equal and consecutive monthly payments being thirty-six (36) minus the number of months in which payments of principal shall have been made in the year of sale.



The promissory note described herein shall be secured by a chattel deed of trust or financing statement or other form of security instrument as may be prescribed by the laws of the State in which the principal office of the Partnership shall be located at the time of sale, and such security instrument shall be given by the selling Partner in a form satisfactory to the attorney for the purchasing Partner. The promissory note shall provide that the Makers shall waive presentment, demand, protest and notice of dishonor, and shall further provide that payments thereunder shall be made at the home address of the Selling Partner, or at such other place as the selling Partner shall designate, from time to time, in writing. The said promissory note shall contain such other provisions as the Partners may mutually agree upon at the time of sale, and the transferring Partner shall deliver to the purchasing Partner such evidence of sale as the purchasing Partner shall require.

Settlement with respect to the above purchase shall take place within ten (10) days after the date on which the purchasing Partner shall notify the Offering Partner of his intention to exercise his option.

In the event that the Partner who shall have received a notice of intention to sell from the Offering Partner shall not elect to purchase the Offering Partner's interest within the fourteen (14) day period prescribed hereinabove in this Paragraph 12., then the Offering Partner shall be free to make the disposition contemplated by him pursuant to the written offer to purchase received by him, provided that the Offering Partner shall make such disposition in strict accordance with the terms and conditions contained in the written offer to purchase received by him as evidenced in the copy of same forwarded to the other Partner.

13. Termination and Dissolution by Mutual Agreement. The Partnership may be dissolved at any time and its business and assets sold by agreement of the Partners, in which event the Partners shall proceed with reasonable promptness to liquidate the business of the Partnership. The Partnership name may, with the consent of both Partners, be sold



with the other assets of the business. The assets of the Partnership business and, to the extent sold, the proceeds from the sale of the assets of the Partnership business shall be used and distributed in the following order:

- A. To pay or provide for payment of all Partnership liabilities, liquidating expenses and obligations, to the extent the same have not been assumed by the purchaser or purchasers.
- B. To repay loans made by one or more of the Partners to the Partnership.
- C. To equalize the capital accounts of the Partners in the event the same shall be disproportionate at the time of distribution.
- D. To discharge the balance of the capital accounts of the Partners.

14. Retirement. Either Partner shall have the right to retire from the Partnership at any time. Written notice of intention to retire shall be served upon the other Partner, by registered mail, at the office of the Partnership at least two (2) months prior to the date of proposed retirement. The retirement of either Partner shall have no effect upon the continuance of the business operated by the Partnership and the remaining Partner shall have the right either to purchase the retiring Partner's interest in the Partnership upon the terms and conditions hereinafter set forth in this Paragraph 14., or to terminate and liquidate the Partnership business pursuant to the provisions of Paragraph 13.

If the Partner not retiring shall be interested in purchasing the ownership interest of the retiring Partner, he shall, within thirty (30) days after having received the written notice of intention to retire, notify the retiring Partner, by registered or certified mail, of the fact that he, the remaining Partner, is interested in purchasing the ownership interest

of the retiring Partner. In addition, within the thirty (30) day period, the Partner not retiring shall make arrangements with the Partnership's accountants to perform, as soon as such work may be scheduled by the accountants, an audit of the books and records and the determination of the purchase price, the submission of reports by the Partnership's accountants, the time in which the Partner not retiring shall be required to absolutely elect to purchase or not to purchase, the computation of the amount the retiring Partner shall receive in the year of sale if the remaining Partner shall elect to purchase, the terms of the promissory note to be delivered by the remaining Partner to the retiring Partner, and the security therefor, shall all be in accordance with the provisions hereinabove contained in Paragraph 12. as if the retiring Partner had received an offer to purchase his Partnership interest from another party except as expressly provided in this Paragraph 14. The retiring Partner shall, if the remaining Partner elects to purchase his Partnership interest, deliver to the purchasing Partner such evidence of transfer and sale as the purchasing Partner shall require. Settlement shall be held within ten (10) days after the date upon which the remaining Partner shall finally exercise his option to purchase, if at all.

The cost of legal and accounting services incurred by the Partnership, the remaining Partner or the retiring Partner, in connection with the computation and documentation above required, shall be borne equally by the Partners.

In the event the remaining Partner does not elect to purchase the interest of the retiring Partner in the Partnership, the Partners shall proceed with reasonable promptness to liquidate the business of the Partnership. The procedure as to liquidation and distribution of the assets or the

proceeds of assets of the Partnership business shall be the same as stated in Paragraph 13. hereinabove.

15. Death. Upon the death of either Partner, the surviving Partner shall be absolutely required to purchase the Partnership interest of the deceased Partner and the Estate of the deceased Partner shall be absolutely bound to sell his Partnership interest to the surviving Partner, all upon the terms and conditions hereinafter set forth. The purchase price of the deceased Partner's interest in the Partnership shall be the greater of the following:

- A. The amount of life insurance carried on the life of the deceased Partner by the surviving Partner or the Partnership, as the case may be, or
- B. The Partnership's accountants shall compute the net worth (book value) of the deceased Partner's capital account as of the date of death of the deceased Partner (the computation of such book value to be made in accordance with the provisions for the same as set forth hereinabove in Paragraph 12. with respect to adjustment for depreciation method) and the purchase price shall be such book value as finally determined by said accountants plus one-half (1/2) of the gross profit on sales realized by the Partnership for ninety (90) days immediately preceding the date of death of the deceased Partner.
- C. In the event that the computation made pursuant to B. above shall result in a net deficit balance in the deceased Partner's capital account as of the date of his death, the provisions of this Paragraph 15. as above set forth would require that the purchase price of the deceased Partner's interest in the Partnership would be the amount of life insurance carried on the life of the deceased Partner by the surviving Partner or the Partnership (see A. above). However, in the event such a deficit shall be in existence, thus invalidating the provisions of B. in favor of A., then the purchase price required by A. shall be reduced by an amount sufficient to eliminate the deficit figure arrived at pursuant to the formula contained in B., and the Estate of the deceased Partner, if it shall have already received the life insurance proceeds, shall be bound to return to the surviving Partner an amount of insurance

proceeds equal to such deficit or the Partnership and/or the surviving Partner, as the case may be, shall only be obligated to transfer to the Estate of the deceased Partner the net amount of insurance proceeds required to be paid; that is to say, the amount of life insurance proceeds received by the Partnership or the surviving Partner, as reduced by the net deficit arrived at pursuant to the formula contained in B. above.

Payment of the purchase price prescribed above (either A. or B.) shall be made as follows:

- (1) Until such time as this Partnership Agreement shall be amended, in writing, that part of the purchase price represented by life insurance proceeds carried on the life of the deceased Partner by the Partnership or the surviving Partner, shall be paid by naming, as primary beneficiary of such life insurance policy, the Estate of the deceased Partner, which shall receive such proceeds directly from the insurance company, subject to the provisions hereinabove contained with respect to the repayment of a portion of such proceeds to the Partnership or the surviving Partner in the event of a deficit in the capital account of the deceased Partner, determined pursuant to B. of this Paragraph 15.
- (2) In the event the purchase price of the deceased Partner's interest in the Partnership shall be greater than the amount of life insurance carried on the life of the deceased Partner by the Partnership or the surviving Partner, then the excess value of the deceased Partner's interest shall be represented by a promissory note in the amount of such excess value, which promissory note shall be executed by the surviving Partner, as Maker, and his spouse, as accommodation endorser, and shall be delivered to the deceased Partner's Estate within sixty (60) days after the death of the deceased Partner. Said promissory note shall provide for payment in equal and consecutive monthly installments over a period of twenty-four (24) months, with the first monthly payment due and payable on the first day of the third calendar month following the date of death of the deceased Partner. Said promissory note shall bear interest at the rate of six (6%) percent per annum until paid and shall contain a provision requiring that the payee or holder shall give thirty (30) days' written notice, by registered mail, to the Maker in the event of default in payment as provided for in the note, and shall contain a further provision that after the expiration of the thirty (30) day notice of default, the holder of the note may accelerate payment of the note, in full. Said promissory note shall contain a provision providing for prepayment at any time, without penalty. Said promissory note shall be secured by such assets of the former Partnership business as the Estate of

the deceased Partner shall designate, provided that the dollar amount of such assets chosen as security shall not exceed twice the amount of the debt represented by the promissory note. The security shall be in the form of a chattel mortgage and/or financing statement or other form of security instrument satisfactory to the Estate of the deceased Partner.

Upon payment of the aforesaid life insurance proceeds and delivery of the aforesaid promissory note, the representative of the deceased Partner's Estate shall, upon appointment, deliver to the surviving Partner such documents evidencing the purchase of the deceased Partner's interest in the Partnership as the surviving Partner shall require, the cost of preparation of such documentation to be borne by the surviving Partner only.

- (3) Delivery of the promissory note and security instruments shall take place within ten (10) days after the accountants for the Partnership shall have been able to compute the purchase price in accordance with Paragraph B. of this Paragraph 15., or within ten (10) days after the receipt of the life insurance proceeds by the Estate of the deceased Partner, whichever shall later occur.

16. Right to Purchase Insurance Policies. In the event that the Partners shall voluntarily terminate the business pursuant to Paragraph 13., or a Partner shall retire pursuant to Paragraph 14., or a Partner shall sell his interest in the Partnership pursuant to Paragraph 12., the Partners or Partner shall have the right to purchase from the Partnership, or the other Partner, the life insurance policy or policies carried on his life by paying to the other Partner, in cash, an amount equal to the terminal reserve of such policy, and upon said payment being made, the other Partner shall take such steps to transfer the ownership of such policy or policies to the purchasing Partner as the insurance company or companies may require.

In the event of the death of a Partner, the surviving Partner shall have the absolute right to purchase the policy of insurance carried on his life, if any, by the deceased Partner, which purchase may be made at

any time within three (3) months after the death of the deceased Partner, the purchase price of same being equal to the cash surrender value of such policy as of the date of death of the deceased Partner. If the surviving Partner shall elect within the said three (3) month period to purchase the said insurance policy from the Estate of the deceased Partner, he shall be required to pay all cash for same. Upon presentation of an amount equal to the cash surrender value of such policy, the Estate of the deceased Partner shall be absolutely required to cause such policy of insurance to be transferred to the surviving Partner or his designee. In the event the deceased Partner, during his lifetime, or the Estate of the deceased Partner, shall have borrowed against such policy, the purchase price to be paid by the surviving Partner shall be reduced by the amount of such indebtedness to the insurance company, including accrued interest to the date of death of the deceased Partner.

17. Incompetency of Partners. In the event that a Partner shall be declared legally incompetent or otherwise unable to manage his personal and/or business affairs, the remaining Partner shall have the option to continue the business of the Partnership for the benefit of the incompetent Partner until such time as the provisions of Paragraphs 12., 13., 14. or 15. shall require otherwise, or if the remaining Partner shall so elect, at any time after the date of adjudication of incompetency, he may purchase the Partnership interest of the incompetent Partner at a purchase price equal to the formula contained in B. of Paragraph 15. upon ~~except promissory note to be (36) this is a limitation of (24) percent of the~~ terms of payment set forth in (2) of Paragraph 15., ~~disregarding the life~~ insurance provision therein contained, it being the intention of the Partners that the entire purchase price pursuant to this paragraph shall be represented by a promissory note described in (2) of Paragraph 15.,



except that the Purchasing Partner shall be required to secure said promissory note by all of the assets of the Partnership business as of the date of his election to purchase. Settlement with respect to such purchase shall be made within ten (10) days after the date upon which the Partnership's accountants shall have arrived at the purchase price in accordance with the provisions of B. of Paragraph 15. If such computation shall result in a deficit balance in the incompetent Partner's capital account, the purchasing Partner shall have the right to acquire the ownership interest of the incompetent Partner for the sum of One Thousand (\$1,000.00) Dollars, cash, and the incompetent Partner shall not be required to reimburse the Partnership for any such deficit. Nothing herein contained shall require the Partner not incompetent to purchase the ownership interest of the incompetent Partner unless he shall elect to do so, in writing, within the prescribed time.

18. Armed Services Provision. In the event a Partner shall voluntarily join any of the Armed Services of the United States, with the written consent of the other Partner, or shall be involuntarily inducted or called into any of the Armed Services of the United States, such Partner shall continue to share in the net profits realized by the Partnership from operations, but his share of such net profits shall be reduced by the cost of the Partnership's engaging a competent replacement to perform his duties during his absence and shall be further reduced by the amount of Armed Services pay received by such Partner. The amount of compensation to be paid to a person engaged by the Partnership to perform the duties of the absent Partner shall be mutually agreed upon, in writing, by the Partners. In addition, the Partner remaining active in the Partnership business shall be entitled to an additional share of the net profits of the



Partnership, equal to the amount of Armed Services pay received by the absent Partner annually on a calendar year basis. Each Partner who may be <sup>enlisted</sup> drafted into the Armed Services of the United States shall, at his earliest opportunity, seek an honorable separation from such Service.

19. Disability. In the event that a Partner shall become ill, be injured, or shall be otherwise incapacitated so as to be absent from the place of business of the Partnership and not performing his normal duties for the established amount of normal working hours per day, for at least fifty-eight (58%) percent of the working days during any given twelve (12) month period, then the Partner not so ill, injured or incapacitated, may, within thirty (30) days after the end of any such twelve (12) month period, elect to purchase the Partnership interest of the ill, injured or incapacitated Partner at a purchase price determined in the same manner as contained in Paragraph 17. hereinabove and upon the same terms and conditions of payment therein set forth.

In the event that during any twelve (12) month period, a Partner shall be ill, injured, or incapacitated, as defined in the preceding paragraph, and for more than fourteen (14) consecutive calendar days, then the Partner not ill, injured, or incapacitated, shall, commencing upon the expiration of said fourteen (14) consecutive calendar days, be entitled to an additional salary of Thirty-Six Dollars and Thirty-Seven Cents (\$36.37) per full working day, over and above his draw, for each day of absence of the ill, injured, or incapacitated Partner, including the first fourteen (14) days of absence, until such time as the ill, injured, or incapacitated Partner shall return to work, on a full time basis, for a period of thirty (30) consecutive working days. Payment of the additional

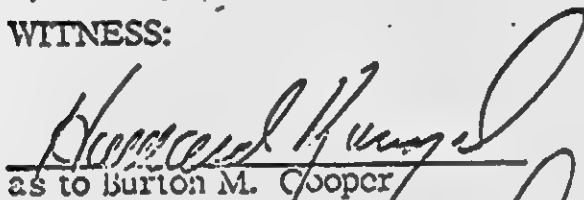
daily wage shall cease upon the ill, injured, or incapacitated Partner returning to work, as aforesaid, but if he shall not continue to work for the required thirty (30) consecutive working days, then the remaining Partner shall be entitled to his additional daily salary as if the ill, injured, or incapacitated Partner shall not have returned to work.

20. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, administrators and executors.

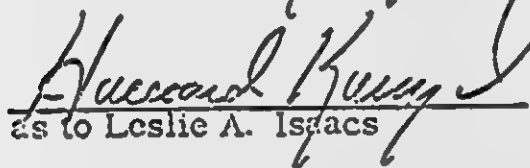
21. Governing Law. This Agreement shall be governed by the laws of the District of Columbia, in such case made and provided.

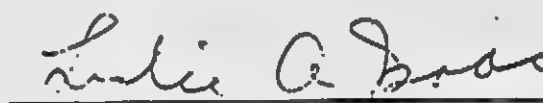
IN WITNESS WHEREOF, the parties hereto have hereunto affixed their respective signatures and seals all on the day and year first hereinabove written.

WITNESS:

  
as to Burton M. Cooper

 [SEAL]  
BURTON M. COOPER

  
as to Leslie A. Isaacs

 [SEAL]  
LESLIE A. ISAACS

ADDENDUM NO. 1 to Partnership Agreement  
Agreement by and between BURTON  
M. COOPER and LESLIE A. ISAACS,  
dated the 11 day of December,

SCHEDULE OF LIFE INSURANCE POLICIES

We, the undersigned, do hereby acknowledge that the foregoing life insurance policies have been purchased pursuant to, and in accordance with the terms and conditions set forth in a Partnership Agreement dated the 11 day of December, 1965, by and between BURTON M. COOPER and LESLIE A. ISAACS.

	<u>Policy No. 4272377</u>	<u>Policy No. 4272378</u>
Issuing Company:	Occidental Insurance Co.	Occidental Insurance Co.
Face Amount:	\$50,000.00	\$50,000.00
Type:	Term	Term
Owner:	Burton M. Cooper	Leslie A. Isaacs
Insured:	Leslie A. Isaacs	Burton M. Cooper
Beneficiary:	Estate of Leslie A. Isaacs	Estate of Burton M. Cooper

Burton M. Cooper  
BURTON M. COOPER

Leslie A. Isaacs  
LESLIE A. ISAACS

AMENDMENT NUMBER ONE  
TO  
LESCO ASSOCIATES PARTNERSHIP AGREEMENT

---

THIS AMENDMENT NUMBER ONE TO THE LESCO ASSOCIATES PARTNERSHIP AGREEMENT, made and entered into as of the 1st day of October, 1967, by and between Burton M. Cooper and Leslie A. Isaacs (collectively hereinafter referred to as the "Partners"), and individually hereinafter referred to by their respective surnames.

WITNESSETH:

WHEREAS, the Partners are carrying on a business known as "Lesco Associates" pursuant to a Partnership Agreement dated December 11, 1965, and

WHEREAS, the Partners have agreed to a change in the profit sharing ratio set forth in paragraph "4" of the Partnership Agreement dated December 11, 1965,

NOW, THEREFORE, in consideration of the sum of Ten (\$10.00) Dollars paid and received by each of the Partners to the other, and for other good and valuable consideration acknowledged to have been received, the Partners do hereby agree as follows:

1. Paragraph "4" of the Partnership Agreement dated December 11, 1965, is hereby amended by deleting therefrom the first sentence as follows:  
"The net profits and losses of the Partnership shall be divided, credited, and/or borne equally between the Partners.", and substituting in lieu thereof the following:

"The net profits and losses of the Partnership, computed for each accounting year, shall be allocated and credited or charged and borne to or by each Partner in the following manner:

A. The first \$55,000 of net profit or loss as reflected on the books of account shall be allocated and credited or charged and borne 50% (\$27,500) to or by Cooper and 50% (\$27,500) to or by Isaacs.

B. The next \$10,000 of said net profit or loss (over \$55,000, but not more than \$65,000) shall be allocated and credited or charged and borne 75% (\$7,500) to or by Cooper and 25% (\$2,500) to or by Isaacs.

C. The next \$10,000 of said net profit or loss (over \$65,000 but not more than \$75,000) shall be allocated and credited or charged and borne 70% (\$7,000) to or by Cooper and 30% (\$3,000) to or by Isaacs.

D. All net profits or losses above \$75,000 shall be allocated and credited or charged and borne 55% to or by Cooper and 45% to or by Isaacs."

2. The Amendment made hereby shall be effective as of the 1st day of October, 1967, and except as amended hereby, the said Partnership Agreement dated December 11, 1965, is hereby reconfirmed and ratified by the Partners as their continuing agreement.

IN WITNESS WHEREOF, the Partners have hereunto affixed their signatures and seals on this      day of October, 1967.

WITNESS:

*Burton M. Cooper*  
as to Burton M. Cooper

*Leslie A. Isaacs*  
as to Leslie A. Isaacs

*Burton M. Cooper* [SEAL]  
Burton M. Cooper

*Leslie A. Isaacs* [SEAL]  
Leslie A. Isaacs

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BURTON M. COOPER	)	
	)	
Plaintiff	)	
	)	Civil Action
v.	)	
	)	No. 2639-70
LESLIE A. ISAACS	)	
	)	
Defendant	)	

MEMORANDUM OPINION

This cause came before the Court for hearing on plaintiff's motions to dismiss defendant's counterclaim and for the appointment of a receiver, and defendant's motion for relief pendente lite. The Court has considered the entire record herein, oral arguments of counsel for both parties, and the post-hearing memoranda.

Plaintiff and defendant are partners in the firm of Lesco Associates, a firm engaged in the sale and distribution of janitorial supplies. The partnership commenced operations under an oral agreement in 1962 and has been carried on pursuant to a written agreement since December 11, 1965. Plaintiff has filed the present action to seek a declaratory judgment and equitable relief. Plaintiff desires the court to declare that plaintiff and defendant are engaged in a partnership known as Lesco Associates<sup>1/</sup> and that said partnership is one at will and

<sup>1/</sup> Plaintiff originally sought a determination of whether plaintiff and defendant were operating as a partnership or as a corporation. At the hearing it was stipulated that this is a partnership, at least until the filing of this suit.

that either party may dissolve the partnership. Plaintiff seeks dissolution of the partnership, allegedly for cause, by decree of Court pursuant to Title 41, District of Columbia Code, Sections 330, 331. He claims that disagreements between the partners have caused and will cause irreparable damage to the partnership. Plaintiff further prays the court to appoint a receiver, pendente lite and permanently, to effect the winding up of the affairs of Lesco Associates.

Plaintiff contends that the partnership as presently constituted is one at will, and not one for a specific term; alternatively, plaintiff argues that even if the court finds the partnership to be one for a specific term, the court should declare the partnership dissolved in accordance with Title 41, D. C. Code, section 331, which provides; inter alia,: "(1) On application by or for a partner the court shall decree dissolution whenever --

\*\*\*\*\*

(d) a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that is not reasonably practicable to carry on the business in partnership with him, [and]

\*\*\*\*\*

(f) other circumstances render a dissolution equitable."

Defendant in his answer agrees that he and the plaintiff were engaged as partners in Lesco Associates prior to the commencement of the present action, but contends



that the partnership was one for a definite term. He has filed a counterclaim against plaintiff alleging that the filing of the complaint herein by plaintiff for dissolution constituted a wrongful dissolution of the partnership, in contravention of the partnership agreement of December 11, 1965. Defendant reads the agreement as providing for termination only by the occurrence of one of the following: sale of the partnership interests, dissolution by mutual agreement, retirement, death or incompetency of a partner. It is alleged, therefore, that a dissolution sought to be grounded on the existence of irreconcilable differences regarding business policy is not provided for in the agreement and is, therefore, in contravention of the agreement. Defendant prays that he be permitted, pursuant to Title 41 D. C. Code, 337(2) (a) and (b) to continue the business of the partnership under the name of the partnership, to possess the partnership property, to pay to plaintiff his share of the partnership assets, but not including the value of the goodwill of the business, or to be permitted to secure a bond established by this court for the protection of plaintiff's interest in the partnership property. Additionally, defendant prays for money damages and the enjoining of plaintiff, pendente lite and permanently, from competing or interfering with the operations of Lesco Associates

anywhere within a 25 mile radius of the District of Columbia.

Defendant's motion for relief pendente lite is based on the contention that plaintiff's unilateral dissolution of the partnership, by the filing of the instant action, constitutes a wrongful termination in contravention of the December 11, 1965, agreement. The relief sought is essentially that set forth above in the counterclaim with the exception that no monetary damages are sought in connection with this motion. Plaintiff opposes this motion and has filed a motion to dismiss the counterclaim contending that the filing of the instant action did not constitute a wrongful termination of the partnership, and therefore, defendant is not entitled to the relief he seeks under 41 D. C. Code 337, which is limited in its application to instances of wrongful dissolution.

The pivotal question initially presented is whether plaintiff wrongfully dissolved the partnership by filing the complaint in this cause? Defendant relies chiefly on two cases to answer this question in the affirmative.<sup>2/</sup> These cases have been exhaustively briefed and argued and it is therefore not necessary to repeat the arguments heretofore presented by both sides. This court

---

<sup>2/</sup> Straus v. Straus, 94 N.W. 2d 679 (Sup. Ct. Minn. 1959) and Clark v. Allen, 333 P. 2d 1100 (Sup. Ct. Oregon 1959).

is of the opinion that neither of the cases cited by defendant is controlling in the present situation. Although the court in Straus said in dictum, on an interlocutory appeal, that the institution of the suit in that case caused an immediate dissolution of the partnership, in contravention of the partnership agreement, it is apparent that the court was attempting to fashion temporary relief particularly suited to the circumstances of that case. In granting relief similar to that sought by defendant here, the trial court in Streus was seeking to protect the plaintiff's interests pending the disposition of the suit, and also to avoid the necessity of appointing a receiver. The appellate court noted<sup>3/</sup> that the question of whether the partnership was one at will or for a definite term was not to be fully determined until trial on the merits. Also left for decision after a trial was the question of whether the plaintiff's action in filing the suit caused a wrongful dissolution of the partnership, thereby permitting a permanent application of the relief already granted on an interim basis by the trial court.<sup>4/</sup>

In the Clark case the trial court had sought to adjudicate the rights of the parties and had dissolved the partnership after a hearing on the merits. The holding of the appellate court there was clearly based on the entire

---

<sup>3/</sup> 94 N.W. 2d at 686.

<sup>4/</sup> The provisions of the Minnesota code applied in Straus are identical to those found in 41 DCC 337.

record which clearly disclosed that the grounds alleged in the various pleadings of the plaintiff were groundless. This is not the case here where this Court is not, in the present posture of this case, able to determine the merits of the parties' claims.

This Court is of the opinion that defendant's position that the mere filing of a suit for dissolution pursuant to the statute constitutes a wrongful dissolution cannot be supported. Section 330 of Title 41, provides:

"Dissolution is caused: (1) Without violation of the partnership agreement between the parties --

\*\*\*\*\*

"(6) By decree of court under section 41-331." (Underscoring supplied).

Section 41-331 provides:

"(1) On application by or for a partner the court shall decree a dissolution whenever --

\*\*\*\*\*

(c) a partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him;

\*\*\*\*\*

(f) other circumstances render a dissolution equitable." (Underscoring supplied).

The Act, therefore, supports plaintiff's theory that dissolution for cause pursuant to section 331 is

effectuated by judicial decree and not by the unilateral act of one of the parties in filing a suit. This court is not prepared to read into the Uniform Partnership Act and the District of Columbia Code a deterrent to the filing of a suit to dissolve a partnership for cause, where there is no clear evidence that such was the intent of the drafters, and where there is lacking persuasive judicial authority to that end. Furthermore, since the parties herein formed their partnership within the confines and requirements of the Uniform Partnership Act, all matters concerning the partnership are governed by the Act, the provisions of which are to be read by implication into the agreement of December 12, 1965. Cf. Cobb v. Howard University, 70 App. D. C. 339 (1939). Thus, the relative rights of the parties are to be determined by reference to their agreement and the Uniform Partnership Act. The Court will not read the partnership agreement in question as eliminating any additional rights found in the Uniform Partnership Act in the absence of a clear intention to do so. There is no such clear intention evidenced in the present case. Therefore, it is the opinion of this court that the filing of the complaint in the instant action did not, of itself, constitute a wrongful dissolution of the partnership involved here and that defendant is not entitled pendente lite to the remedies

available under 41 D. C. Code 337. Accordingly, defendant's motion for relief pendente lite must be denied since it rests squarely on the proposition, rejected by this Court, that the filing of the instant suit, without more, constituted a wrongful dissolution of the partnership.

Although the Court has determined that the mere filing of the complaint did not constitute a wrongful dissolution of the partnership and therefore, defendant is not entitled to the pendente lite relief he seeks, plaintiff's motion to dismiss the counterclaim will be denied. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 353 U. S. 41 (1957). The Court cannot say prior to an evidentiary hearing whether or not plaintiff wrongfully caused a dissolution of the partnership.

In his motion for the appointment of a receiver, pendente lite, plaintiff contends that a receiver is necessary in order to conserve the assets of the partnership, preserve its good will, and prevent a diminution of profits, all of which would be otherwise adversely affected by the continuing discord and dissension between the partners. After having considered the pleadings and the

entire record in this case, the court finds that there exist irreconcilable disagreements and dissension between the partners in regard to the conduct of their affairs so as to endanger the partnership's good will and property. The affidavits, counter-affidavits and reply affidavit in this file are sufficient to convince this Court that there is much disagreement and dissension between the parties, the existence of which poses a threat to the continued success of the partnership business. This Court does not at this time place the fault on one party or the other, but it will not stay its hand in the face of such problems until such time as the property and good will of the business are extinguished. Consistent with the opinion in Creel v. Creel, 63 App. D. C. 384, 73 F. 2d 107 (1934), a receiver should be appointed to maintain and preserve the assets and good will of the partnership and to direct and control its operations during the pendency of this action.

---

Joseph C. Waddy  
United States District Judge



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BURTON M. COOPER,

Plaintiff

v.

LESLIE A. ISAACS,

Defendant

Civil Action

No. 2639-70

ORDER DENYING RELIEF PENDENTE LITE

Upon consideration of the motion of defendant for relief pendente lite, the pleadings, affidavits and exhibits filed herein and the arguments of counsel, it is by the Court this 12th day of November, 1970,

ORDERED, that defendant's motion for relief pendente lite be and the same hereby is denied.

5  
\_\_\_\_\_  
Joseph C. Waddy  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BURTON M. COOPER,

Plaintiff

v.

LESLIE A. ISAACS,

Defendant

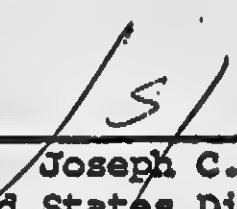
Civil Action

No. 2639-70

ORDER DENYING MOTION TO DISMISS  
COUNTERCLAIM

Upon consideration of plaintiff's motion to dismiss the defendant's counterclaim, the pleadings herein and arguments of counsel, it is by the Court this 12th day of November, 1970,

ORDERED, that plaintiff's motion to dismiss defendant's counterclaim be and the same hereby is denied.

  
\_\_\_\_\_  
Joseph C. Waddy  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BURTON M. COOPER )

Plaintiff )

v. )

LESLIE A. ISAACS )

Defendant )

Civil Action No. 2639-70

ORDER APPOINTING RECEIVER PENDENTE LITE

Upon consideration of plaintiff's Motion for Appointment of Receiver Pendente Lite for the operation of the business of the partnership owned by the parties hereto and known as "Lesco Associates," and upon consideration of defendant's Motion for Temporary Relief, and after consideration of the affidavits, legal memoranda and oral arguments of counsel on both Motions, it is by the Court this \_\_\_\_\_ day of October, 1970

ORDERED, that defendant's Motion for Temporary Relief be, and the same is, hereby denied, and it is

FURTHER ORDERED, that \_\_\_\_\_,

a member of the Bar of this Court be, and he is hereby, appointed as a Receiver pendente lite for the business of the partnership known as "Lesco Associates," with full power to direct and control its operations, including the right and power to resolve all matters of dispute between the owners involved in the operation of the business, and each of the parties hereto is hereby directed to cooperate with and comply with the orders and directions of said Receiver pending further order of this Court, and it is

FURTHER ORDERED, that said Receiver be, and he is hereby, directed to make a written report to this Court during each 90 days' period this order continues in effect concerning all operations of the business and until further order of this Court.

---

Judge

interest and may require an account from the date only of the last account agreed to by all the partners. (Sept. 27, 1962, 76 Stat. 641, Pub. L. 87-709, § 27.)

**EFFECTIVE DATE**

See note to section 41-301.

**§ 41-327. Partner's interest subject to charging order.**

(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts, and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this chapter shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership. (Sept. 27, 1962, 76 Stat. 641, Pub. L. 87-709, § 28.)

**EFFECTIVE DATE**

See note to section 41-301.

**PART VI****DISSOLUTION AND WINDING UP****§ 41-328. Dissolution defined.**

The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business. (Sept. 27, 1962, 76 Stat. 642, Pub. L. 87-709, § 29.)

**§ 41-329. Partnership not terminated by dissolution.**

On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed. (Sept. 27, 1962, 76 Stat. 642 Pub. L. 87-709, § 30.)

**EFFECTIVE DATE**

See note to section 41-301.

**§ 41-330. Causes of dissolution.**

Dissolution is caused: (1) Without violation of the agreement between the partners—

(a) by the termination of the definite term or particular undertaking specified in the agreement,

(b) by the express will of any partner when no definite term or particular undertaking is specified,

(c) by the express will of all the partners who have not assigned their interests or suffered them

to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) by the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 41-331. (Sept. 27, 1962, 76 Stat. 642, Pub. L. 87-709, § 31.)

**EFFECTIVE DATE**

See note to section 41-301.

**§ 41-331. Dissolution by decree of court.**

(1) On application by or for a partner the court shall decree a dissolution whenever—

(a) a partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) a partner becomes in any other way incapable of performing his part of the partnership contract,

(c) a partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) the business of the partnership can only be carried on at a loss,

(f) other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 41-326 and 41-327—

(a) after the termination of the specified term or particular undertaking,

(b) at any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

(Sept. 27, 1962, 76 Stat. 642, Pub. L. 87-709, § 32.)

**EFFECTIVE DATE**

See note to section 41-301.

**§ 41-332. General effect of dissolution on authority of partner.**

Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership—

(1) with respect to the partners—

(a) when the dissolution is not by the act, bankruptcy or death of a partner; or

(b) when the dissolution is by such act, bankruptcy or death of a partner, in cases where section 41-333 so requires;

(2) with respect to persons not partners, as declared in section 41-334. (Sept. 27, 1962, 76 Stat. 643, Pub. L. 87-709, § 33.)

**EFFECTIVE DATE**

See note to section 41-301.

§ 41-333. Right of partner to contribution from copartners after dissolution.

Where the dissolution is caused by the act, death, or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless—

(a) the dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) the dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

(Sept. 27, 1962, 76 Stat. 643, Pub. L. 87-709, § 34.)

**EFFECTIVE DATE**

See note to section 41-301.

§ 41-334. Power of partner to bind partnership to third persons after dissolution.

(1) After dissolution a partner can bind the partnership except as provided in paragraph (3)—

(a) by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) by any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction,

(I) had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1)(b) shall be satisfied out of partnership assets alone when such partner has been prior to dissolution—

(a) unknown as a partner to the person with whom the contract is made; and

(b) so far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution—

(a) where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) where the partner has become bankrupt; or  
(c) where the partner has no authority to wind up partnership affairs; except by a transaction with one who,

(I) had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority had not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1)(b)(II).

(4) Nothing in this section shall affect the liability under section 41-315 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business. (Sept. 27, 1962, 76 Stat. 643, Pub. L. 87-709, § 35.)

**EFFECTIVE DATE**

See note to section 41-301.

§ 41-335. Effect of dissolution on partner's existing liability.

(1) The dissolution of the partnership does not—  
of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts. (Sept. 27, 1962, 76 Stat. 644, Pub. L. 87-709, § 36.)

**EFFECTIVE DATE**

See note to section 41-301.

§ 41-336. Right to wind up.

Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs: *Provided, however,* That any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court. (Sept. 27, 1962, 76 Stat. 644, Pub. L. 87-709, § 37.)

§ 41-337. Rights of partners to application of partnership property.

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartner and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed,



may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 41-335(2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have—

- (I) all the rights specified in paragraph (1) of this section, and
- (II) the right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2) (a) (II) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have—

(I) if the business is not continued under the provisions of paragraph (2) (b) all the rights of a partner under paragraph (1), subject to clause (2) (a) (II) of this section.

(II) if the business is continued under paragraph (2) (b) of this section, the right as against his copartners and all claiming through them in respect of their interests in the partnership to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the goodwill of the business shall not be considered.

(Sept. 27, 1962, 76 Stat. 644, Pub. L. 87-709, § 38.)

#### EFFECTIVE DATE

See note to section 41-301.

#### § 41-338. Rights where partnership is dissolved for fraud or misrepresentation.

Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an in-

terest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership. (Sept. 27, 1962, 76 Stat. 645, Pub. L. 87-709, § 39.)

#### EFFECTIVE DATE

See note to section 41-301.

#### § 41-339. Rules for distribution.

In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:—

(a) The assets of the partnership are—

- (I) the partnership property.
- (II) the contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

- (I) Those owing to creditors other than partners.
- (II) Those owing to partners other than for capital and profits.
- (III) Those owing to partners in respect of capital.
- (IV) Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section 41-317(a), the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

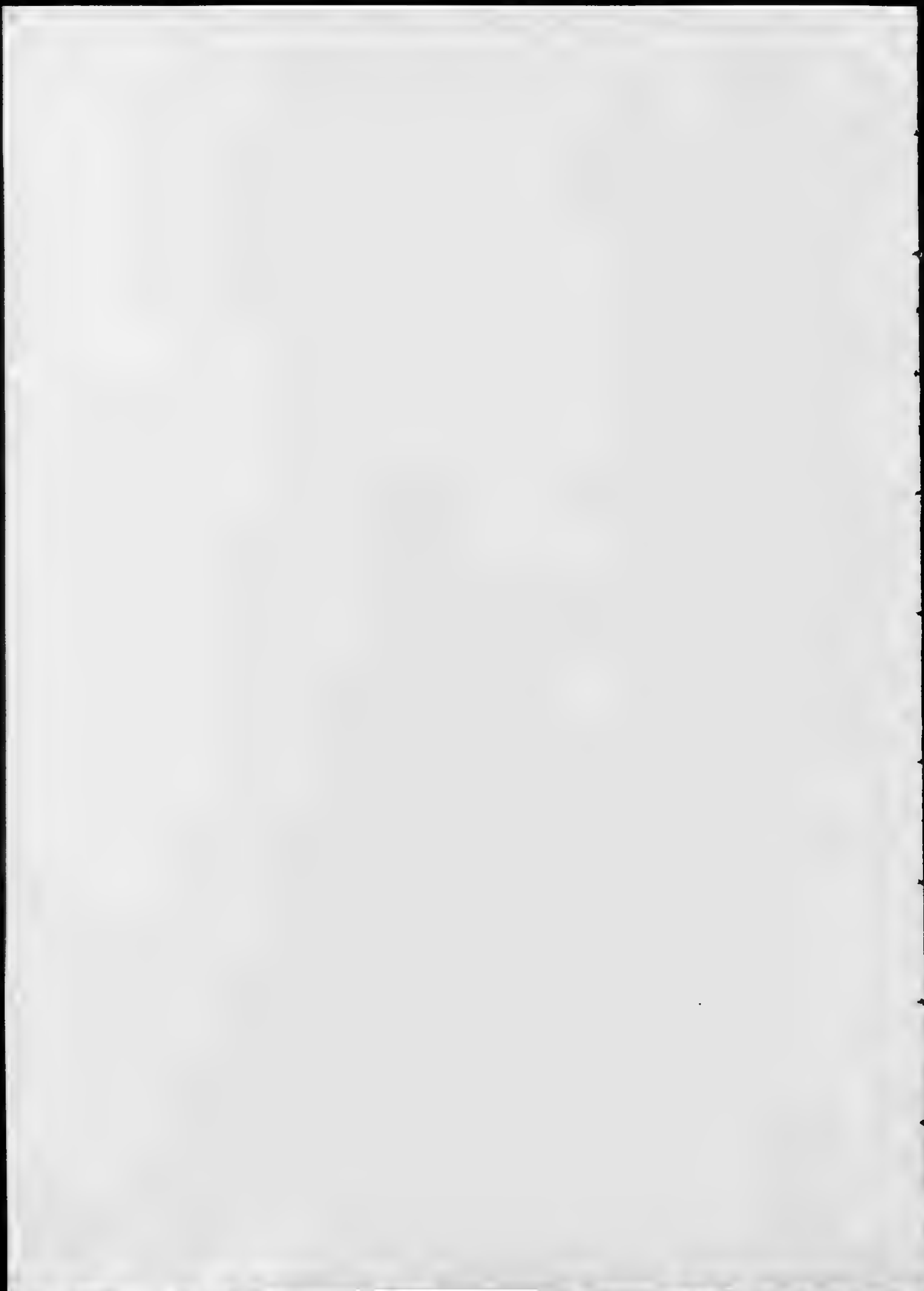
(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(h) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

- (I) Those owing to separate creditors.
- (II) Those owing to partnership creditors.





BRIEF AND APPENDICES FOR APPELLEE

---

*United States Court of Appeals*  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,807

---

BURTON M. COOPER, APPELLEE

v.

LESLIE A. ISAACS, APPELLANT

---

*Interlocutory Appeal from the  
United States District Court  
For the District of Columbia*

---

GINSBURG, FELDMAN AND BRESS

DAVID G. BRESS

THOMAS C. GREEN

1700 Pennsylvania Ave., N.W.  
Washington, D. C. 20046

C.A. No. 2639-70

1-6-42m3  
 2-12x  
 3-11  
 4-7x-1x  
 5-6-23  
 7-0-1  
 8-11  
 71

# I N D E X

	Page
Counterstatement of the Case . . . . .	1
Argument:	
I. Introduction . . . . .	6
II. The District Court Properly Exercised its discretion in Appointing a Receiver on the Facts of this Case . . . . .	9
III. Title 28 U.S.C. Does Not Authorize an Interlocutory Appeal from the District Court's Order Denying Appellant's Motion for Relief <u>Pendente Lite</u> . . . . .	18
A. The Order of the District Court Denying Appellant's Motion for Relief <u>Pendente Lite</u> was not Tantamount to Refusing an Injunction	18
B. The Relief Denied to Appellant was not in the nature of a Receiver . . . . .	20
C. 28 U.S.C. §1292(a)(2) Does Not Permit an Appeal from a Decision Denying the Appointment of a Receiver . . . . .	23
IV. Even If Appealable, the Decision of the District Court Holding That Appellant Was Not Entitled As A Matter of Law to Invoke the Forfeiture and Penalty Provisions of Section 337 of Title 41 As a Form of Interim Relief Was Correct . . . . .	24
Conclusion . . . . .	31
Appendix A . . . . .	32
Appendix B . . . . .	39

Do the Ch. 11  
 parties constitute  
 separate groups for  
 purposes of  
 priority?

## II

### TABLE OF CASES

	Page
<u>Acker v. Skrotsky</u> , 85 A.2d 277 (App. Div. N.J. 1951).....	24
<u>Application of Pivot Punch and Die Corporation</u> , 182 N.Y.S. 2d, 459 (Sup. Ct. N.Y. 1959).....	10
<u>Baltimore Contractors v. Bodinger</u> , 348 U.S. 176 (1955)....	19, 24
<u>Clark v. Allen</u> , 333 P.2d 1100 (Sup. Ct. Ore. 1959).....	28
* <u>Creel v. Creel</u> , 63 U.S. App. D.C. 384, 73 F.2d 107 (1934), <u>cert. den.</u> 294 U.S. 723 (1935).....	13
<u>Dolenga v. Lipka</u> , 195 N.W. 90 (Sup. Ct. Mich. 1923).....	21
<u>Florida v. United States</u> , 285, F.2d 596 (8th Cir. 1960)...	24
* <u>Ferrick v. Barry</u> , 68 N.E. 690 (Sup. Ct. Mass. 1946).....	26, 27
* <u>Fisher v. Fisher</u> , 212 N.E. 2d 222 (Sup Ct. Mass. 1965)...	27
<u>Fooks v. Williams</u> , 87 A. 692 (Ct. App. Md. 1913).....	26
<u>Francis O. Day Co. v. Shapiro</u> , 105 U.S. App. 392, 267 F.2d 669 (1959).....	8
<u>Goldstein v. Cox</u> , 90 S. Ct. 671 (1970).....	20
<u>Great A. &amp; P. Tea Co. v. Amalgamated Meat Cutters, Etc.</u> , 410 F.2d 650 (8th Cir. 1969).....	8
<u>Jones v. Herring</u> , 292 S.W. 296 (Ct. Civ. App. Tex. 1927).	24
* <u>Jones v. Jones</u> , 16 S.W. 2d 503 (Ct. App. Ky. 1929).....	13
<u>Meyers, Whitty &amp; Hodge v. Popich Marine Const.</u> , 143 So. 2d 739 (Ct. App. La. 1962).....	23
<u>Morgantown v. Royal Insurance Co.</u> , 337 U.S. 254 (1949)...	20

### III

<u>Napoli v. Domnitch</u> , 226 N.Y.S. 2d 908; <u>aff'd and modified</u> , 236 N.Y.S. 2d 549 (1962); <u>aff'd</u> , 248 N.Y.S. 2d 228 (1964)...	28
* <u>Owen v. Cohen</u> , 119 P.2d 713 (Sup. Ct. Cal. 1941).....	10,26,27
<u>Phillip v. Von Raven et al.</u> , 57 N.Y.S. 701 (Sup. Ct. 1899)....	22,25
<u>Ritchie v. United Mine Workers of America</u> , 410 F.2d 827 (6th Cir. 1969).....	8
<u>Sikora v. Brenner</u> , 126 U.S. App. D.C. 357, 379 F.2d 134 (1967).....	8
<u>Singer v. Heller</u> , 40 Wis. 544 (1876).....	26
* <u>Stark v. Reingold</u> , 113 A.2d 679 (Sup. Ct. N.J. 1955).....	26,27
<u>Straus v. Straus</u> , 94 N.W. 2d 679 (Sup. Ct. Minn. 1969).....	22,28
<u>United States v. Jeff Fort</u> , D.C. Cir. No. 22, 746, decided December 14, 1970.....	9
<u>Williams v. United States</u> , 405 F.2d 951 (9th Cir. 1969).....	8
<u>Wrenn v. Wrenn</u> , 91 S.E. 2d 267 (Sup. Ct. So. Car. 1956).....	13,22

\* Cases chiefly relied upon are marked by asteriks.

# ISSUES PRESENTED\*

In the opinion of appellee, the following issues are presented:

I. Did the District Court properly exercise its discretion in appointing a receiver on the facts of this case?

II. Does Title 28 U.S.C. §1292 authorize an appeal from the District Court's order denying appellant's Motion for Relief Pendente Lite, where:

- A. The order of the lower court was not tantamount to refusing an injunction;
- B. The relief denied was not in the nature of a receiver; and
- C. The express language of 28 U.S.C. §1292 does not permit an appeal from a decision denying the appointment of a receiver?

III. Did the District Court correctly conclude that appellant was not entitled as a matter of law to invoke the forfeiture and penalty provisions of Section 337 of Title 41 as a form of interim relief?

---

\* This case has previously been before this Court on appellant's Motion for Summary Reversal and appellee's Motion for Summary Affirmance, both of which were denied on December 10, 1970 with a further order to the parties to agree to an expedited briefing schedule.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

---

No. 24,807

---

BURTON M. COOPER, APPELLEE

v.

LESLIE A. ISSACS, APPELLANT

---

Interlocutory Appeal from the  
United States District Court  
for the District of Columbia

---

BRIEF FOR APPELLEE

---

COUNTERSTATEMENT OF THE CASE

Appellee, plaintiff below, filed his complaint on September 3, 1970 initially seeking a declaratory judgment whether appellee and appellant are partners doing business in the District of Columbia as "Lesco Associates", or whether they are doing business under the aegis of a corporation. If after trial on



the merits a partnership is declared to exist between the parties, appellee additionally prays for affirmative equitable relief by way of an order dissolving the partnership for cause,

Because of irreconcilable differences which have arisen between said partners so that they have been and are unable to agree on policies of the business and their respective roles in it, and because of their inability to resolve such differences . . . . 1/

If a corporation is declared to exist, the complaint seeks an order dissolving the corporation on grounds of deadlock.

Appellant in his answer admitted that irreconcilable differences existed between the parties and stated that he and appellee were partners, but in his counterclaim he alleged that appellee's filing of the complaint, standing alone and as a matter of law, amounted to a "wrongful dissolution" of the partnership within the meaning of Section 337 of Title

1/ Complaint at p. 2.

41, for which appellant was entitled to damages. 2/

Thereafter, both parties filed motions for interim relief. In his Motion for Relief Pendente Lite filed on September 15, 1970, appellant attempted to take over the business by seeking to invoke the forfeiture and penalty machinery contained in Section 337. His contention was simply that appellee had wrongfully dissolved the partnership

(Also, could be  
argued in the  
partnership  
agreement.)

2/ In pertinent part Section 337 provides:

(2) When dissolution is caused in contra-  
vention of the partnership agreement the rights  
of the partners shall be as follows:

(a) Each partner who has not caused  
dissolution wrongfully shall have --

(II) the right, as against each partner  
who has caused the dissolution wrongfully, to  
damages for breach of the agreement.

(b) The partners who have not caused the  
dissolution wrongfully, if they all desire to  
continue the business in the same name, either by  
themselves or jointly with others, may do so, during  
the agreed term for the partnership and for that purpose  
may possess the partnership property, provided they  
secure the payment by bond approved by the court, or  
pay to any partner who has caused the dissolution  
wrongfully, the value of his interest in the partner-  
ship at the dissolution, less any damages recoverable  
under clause (2)(a)(II) of this section, and in like  
manner indemnify him against all present or future  
partnership liabilities.

by the mere filing of his suit, and thereby appellant was  
entitled by statute to post bond and oust appellee from the  
business so that appellant could operate said business alone. 3/1 &

This unsound and illogical contention was further exaggerated  
by the claim that appellee not only be denied his right to  
participate in the management of the business simply because  
he had filed a declaratory judgment suit, but that appellee  
be enjoined, after ouster, from competing and from otherwise  
interfering with the conduct of the business by appellant.

*VS. [unclear]  
Filed [unclear]  
the [unclear]*

In opposition to appellant's suggestion that he be  
placed in exclusive control and in a superior position

---

3/ It is noteworthy that had appellant in his answer taken  
the position that he and appellee were doing business as a  
corporation and had he even theorized that the filing of  
appellee's complaint worked a wrongful dissolution of the  
corporation, he could not have sought the removal of appellee  
from the business, because no forfeiture and penalty pro-  
visions of the type contained in Section 337 exist in the  
1954 Business Corporations Act in title 29.

*VIP*

At trial on the merits appellee will demonstrate that  
one subject of disagreement between the parties concerns the  
nature of their business relationship, and that up to the  
time of the filing of his answer appellant had consistently  
maintained that he and appellee were doing business as a  
corporation. Under these circumstances appellant's abandon-  
ment of the corporate entity generates a compelling inference  
that it was done on a calculated basis and not in an effort  
to refine the issues for the District Court.

relative to appellee prior to any hearing on the merits,  
on September 21, 1970 appellee requested appointment of an  
impartial receiver to take charge of the business so as to  
preserve its assets and goodwill and to arbitrate and  
resolve disagreements between the parties in the management  
of operations pending trial on the merits.

These motions came on for hearing before the District  
Court on October 14, 1970. Prior to its decision the record  
was further augmented on October 15, 1970 by appellant's  
unsolicited filing of a Memorandum and supplemental affidavit.  
Thereafter appellee felt constrained to file a Memorandum in  
Reply on October 16, 1970. Attached to this document was an  
affidavit executed by appellee, which is reproduced as  
Appendix A herein. Subsequently on November 12, 1970 appellee  
filed a Motion for Emergency Relief, and in support thereof  
he submitted a second affidavit reproduced as Appendix B  
herein. Together, these affidavits recite instances of  
serious and irreconcilable dissension and discord existing  
between the parties and accounts of assaultive and abusive  
conduct on the part of appellant towards appellee, which  
caused appellee to reiterate urgently his request for the

appointment of a temporary receiver.

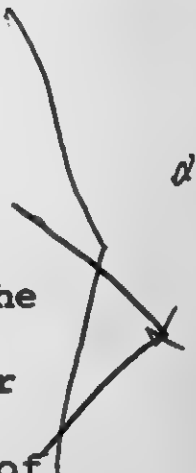
Upon consideration of the entire record including the arguments and representations made by all counsel in open court, the District Court granted appellee's motion for the appointment of an impartial receiver and denied appellant's motion to be placed in exclusive control of the business under D.C. Code Section 337, Title 41.

From these decisions appellant noted his appeal, and he presently alleges jurisdiction to review both orders based on Title 28 U.S.C. Section 1292(a)(1) and (2).

#### ARGUMENT

##### I. INTRODUCTION

Interwoven throughout appellant's various arguments is an attempt to make much ado about a typographical error which occurred in the initial paragraph of the Complaint, wherein we inadvertently stated that the jurisdiction of the District Court to decree a dissolution of a partnership for cause was predicated on Section "330" of Title 41 instead of



Section "331".<sup>4/</sup> In every subsequent pleading and motion below appellee meticulously pointed out that he was seeking equitable relief in this regard pursuant to Section 331. At argument on the respective motions for interim relief we repeatedly stated and emphasized that Section 331 was the correct source of jurisdiction, and the opinion of the District Court demonstrates that the basis on which we were proceeding was made entirely clear.

4/ Section 331 of Title 41, District of Columbia Code states: *by do you want the? does it have to be in the 1st year?*

Dissolution by decree of court.

(1) On application by or for a partner the court shall decree a dissolution whenever --

(a) a partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) a partner becomes in any other way incapable of performing his part of the partnership contract,

(c) a partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) the business of the partnership can only be carried on at a loss.

(f) other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 41-326 and 41-327 --

(a) after the termination of the specified term or particular undertaking,

(b) at any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

*Indicate this in the earlier*

Nevertheless. in his brief filed in this Court at pages 32-34, and in his pleadings and motions below, appellant attempts to capitalize on this inadvertence and seemingly intimates that the lower court should have ignored Section 331.

Mistaken citation notwithstanding, the facts alleged in the Complaint pertaining to irreconcilable differences over the conduct of operations causing irreparable damage to the partnership business properly invoke the court's jurisdiction under Section 331 to decree a dissolution for cause. See, Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969); Sikora v. Brenner, 126 U.S. App. D.C. 357, 359, 379 F.2d 134, 136 (1967). Moreover, it is fundamental that,

The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Francis O. Day Co. v. Shapiro, 105 U.S. App. D.C. 392, 394, 267 F.2d 669, 671 (1959); Ritchie v. United Mine Workers of America, 410 F.2d 827 (6th Cir. 1969); Great A. & P. Tea Co. v. Amalgamated Meat Cutters, Etc., 410 F.2d 650, 652 (8th Cir. 1969).



While we regret the typographical error, we think it clear that appellant has at no time been misled as to the jurisdictional basis underlying our claim, and such an error is hardly a reason for disturbing the conclusions of the District Court. Cf. United States v Jeff Fort, D. C. Cir. No. 22,746, decided December 14, 1970, slip op. at 29-31.

II. THE DISTRICT COURT PROPERLY EXERCISED  
ITS DISCRETION IN APPOINTING A  
RECEIVER ON THE FACTS OF THIS CASE

Appellant initially contends that the appointment of a receiver on the facts of this case is contrary to precedent. We suggest, however, that in the context of reviewing a lower court's response to particular exigent circumstances precedent should not be the determinative factor in assessing the propriety of the relief granted. More important is a close examination of the facts which were presented to the court below and a consideration of the reasonable inferences flowing therefrom, which serve to illuminate the atmosphere presently existing between the parties.

Appellant appears to subscribe to the position that severe discord and dissension is not an appropriate reason for disturbing the partnership relationship if the business

~~But the lower  
didn't find  
the way~~

evere

~~Thin is~~  
the key to  
it's good  
even  
and yet  
one is  
that is  
expected

continues to enjoy profits. Appellee rejects that theory, and he has filed suit because his relationship with appellant has become unwholesome and precarious. See, Owen v Cohen, 119 P. 2d 713 (Sup. Ct. Cal. 1941). It is appellee's opinion, as reflected in his affidavits filed below and attached hereto as Appendix A and B, that fundamental, intrinsic values associated with a viable partnership relationship have all but disappeared in his association with appellant.

In addition to the technical rules surrounding a partnership and perhaps from a purely moral point of view, more important, there exists between partners the highest degree of fidelity, loyalty, trust, faith, and confidence. When these characteristics in a partnership cease, 5 then the true partnership ceases . . . .

*He can just get out, then (Baker if he moved out.)  
The de fusing below don't seem to add up to much for him*

The acrimony and discord infecting the parties' present relationship is aptly reflected in part in appellant's pleadings. Following the filing of the complaint appellant admitted in his answer the existence of irreconcilable disagreement with appellee. 6 He then moved to invoke the forfeiture and penalty provisions of Section 337. In contrast, appellee requested that an impartial receiver be appointed to

*??*

5 / Application of Pivot Punch & Die Corporation, 182 N.Y.S. 2d, 459 (Sup. Ct. N.Y. 1959).

6 / It is only in this Court and for the first time that appellant contends that irreconcilable differences are "alleged".

preserve the assets and goodwill of the business until his suit is eventually resolved. The relief requested by each party is designed to achieve significantly different results, and when the respective motions came on for hearing, appellant's attempt at the outset to acquire a superior position in the management of the business relative to appellee was not lost upon the District Court.

In addition various affidavits were filed below by both parties in connection with the motions for interim relief. They contain abundant and serious allegations and retorts, which clearly established to the satisfaction of the District Court that severe dissension and distrust existed between the partners. Of even graver importance, however, was appellee's uncontradicted averment that appellant's behavior in the course of attempted discussions was on occasion so volatile and agitated that appellee experienced "veritable apprehension for [his] personal safety"<sup>7/</sup> and was thereby deterred from seeking to communicate with appellant in regard to controversial matters of business policy.

---

<sup>7/</sup> Appellee's statement was contained in his affidavit filed in the District Court with his Memorandum In Reply at page 5. It is attached hereto as Appendix A.

This condition continued to deteriorate to the point where appellee was compelled to seek extraordinary and emergency relief by requesting the District Court to restrain appellant from engaging in intimidating and assaultive conduct. The official court file and record will reflect that on November 12, 1970 counsel for both parties appeared in open court, at which time the sworn allegations contained in appellee's affidavit attached to his motion were considered by the court. <sup>8/</sup> Upon the conclusion of appellee's presentation, which included a recitation of a serious assault by appellant upon appellee and appellant's use of abusive and threatening language, the District Court announced its intention to appoint a receiver. Its order to that effect was signed later the same day.

In his initial affidavit filed below, appellee has stated that anxious confrontations occurring with appellant are defused only when one of the parties deliberately leaves the premises. The effect of this condition is, therefore, to deprive the business of the energy and talent of one of the partners and to force appellee to accede to appellant's belligerency. The receiver appointed by the District Court will

8/ This affidavit is included as Appendix B.

67123

effectively insure that both parties are able to participate in the business until such time as the business is either sold in connection with a judicial decree of dissolution, or left to continue in the event that relief be denied.

In either event, the District Court appropriately concluded that financial injury to the business is likely to occur if discord and dissension between the parties continues to exacerbate their relationship. With the possibility presented that the partnership may be dissolved, and the business thereafter offered for sale, the District Court was required to synthesize the need to protect appellee with its desire to preserve the assets and goodwill of the business.

In the circumstances of this case we think that the appointment of the receiver was reasonably calculated to serve both ends and cannot be faulted as an abuse of the Court's discretion.

Furthermore, the cases cited by appellant evidencing appellate disapproval of the appointment of a receiver on the facts therein did not involve a dimension of open hostility between the parties with which the District Court had to contend.

9/ Cf., Creel v. Creel, 63 U.S. App. D.C. 384, 73 F.2d 107 (1934), cert. den. 294 U.S. 723 (1935); Wrenn v. Wrenn, 91 S.E. 2d, 267 (Sup. Ct. So. Car. 1956); Jones v. Jones, 16 S.W. 2d 503 (Ct. App. Ky. 1929).

Appellant's speculation that the appointment of the receiver will cause a loss of customers, salesmen, and suppliers must be balanced against the substantial likelihood of inevitable injury to the business which would occur from the parties' strained relationship and which deprives the business of the valuable executive management theretofore rendered by appellee. In this context the presence of the receiver cannot fairly be isolated as the cause of expected and allegedly irreparable injury, and whatever incremental detriment his activities may generate it can be minimized if the parties' conduct will allow the receiver to assume a low profile.<sup>10/</sup> The most effective insurance, however, against any deterioration in the status of the business is an early

<sup>10/</sup> While we styled our request below as a motion for Appointment of Receiver, we did not envision or urge that management or control of the business be turned over to the Court's representative. Rather, we attempted to suggest a form of relief to meet the problem to facilitate communication between the parties so as to prevent acts of violence and to resolve disputes about management, thereby permitting the parties themselves to continue to operate the business as far as practicable. And that is what has taken place. As a result, the function of the "receiver" in the context of this case is more analogous to the role of a referee or peace-keeper than one whose presence signifies "a sign of death and incompetence." Brief for Appellant at p. 18. Because the receiver in this case does not operate the business nor have title to its property nor make contracts for it, his presence represents a slight intrusion into the affairs of the business and undoubtedly serves as a catalyst to promote the continuation of operations pending trial. The District Court wisely fashioned relief to meet a vital need.



resolution of the present suit by the District Court. That Court had before it appellee's suggestion that a hearing on the merits be expedited and a motion to advance for trial is in preparation, but the scheduling of a trial date is in abeyance pending this appeal.

Appellant next contends that a receiver should not have been appointed because the complaint indicates that appellee cannot prevail upon the merits. Such an argument would have been more properly presented first to the District Court by way of a motion for summary judgment or for judgment on the pleadings. In any event the claim is entirely without merit.

Appellant appears to urge that his partnership agreement with appellee precludes resort to a court for equitable relief by way of a decree dissolving the partnership where irreconcilable differences and disagreements between the parties make further coexistence insufferable and exclude the possibility of joint participation in the management of operations. As we demonstrate ahead in Part IV of our argument, these allegations of fact, if established at the pending hearing on the merits, constitute abundant cause for judicial dissolution of the partnership under Section 331 of Title 41.

but is affecting by  
forced out.

by with in a  
is the with  
the



Instead of seeking equitable relief from the District Court appellant suggests that appellee should have exercised his right to retire under the terms of their partnership agreement, and that by foregoing this procedure appellee contravened that agreement and is thereby not entitled to a decree of dissolution. This argument smacks of disingenuousness and raises serious questions of fundamental fairness. In reality it is but another way of contending that although the pending evidentiary hearing on the merits may reveal appellant's conduct to be the underlying and sole cause of the dissension and discord now existing between the parties, and irrespective of appellant's belligerent and assaultive behavior towards appellee, it is appellee who should unilaterally depart the business and leave operations in the exclusive control of appellant. Neither the Uniform Partnership Act nor the express language of the partnership agreement support such

11/ The partnership agreement contains a mathematical formula to calculate the value of the retiring partner's share of the business. Contrary to appellant's assertions the amount which would be owing under such formula were appellee to retire, is far less than the figure appellee would receive from a sale of the business to a third party. This disparity lies at the heart of appellant's opportunistic attempt to force appellee to "retire" from the partnership.

*So big question is whether all this is covered by the partnership agreement. Can you say that they contemplated such a thing as it was only a voluntary act.*

But these provisions can be  
nullified ~~by the~~ by the partnership agreement  
- 17 -

an anomalous result, and to embrace appellant's argument requires a finding that the operative provisions of Section 331 of Title 41 were not enacted to afford relief to a partner whose associate makes life together intolerable and impedes participation in the business.

Finally, appellant argues that the appointment of a receiver is contrary to public policy, because it will serve to discourage competition with the liquidation of a thriving business. We disagree, and we see nothing in the Uniform Partnership Act to suggest that in adjudicating the rights of partners courts are to consider the preservation of the business as the paramount objective. In fact, the language and thrust of Section 331 of Title 41, giving to the Court jurisdiction to dissolve a partnership for cause, indicates that public policy favors the termination of a partnership in which the relationship between the parties has been dehumanized. Accordingly, for the reasons stated above we submit that the District Court properly exercised its discretion in appointing a receiver.

Don't  
this  
cause.

by law etc. but reluctant  
to dissolve partnerships  
knowing they kept coming  
back just as long as there  
was a way.

III. TITLE 28 U.S.C. §1292 DOES NOT AUTHORIZE  
AN INTERLOCUTORY APPEAL FROM THE DISTRICT  
COURT'S ORDER DENYING APPELLANT'S MOTION  
FOR RELIEF PENDENTE LITE

A. The Order of the District Court Denying Appellant's  
Motion for Relief Pendente Lite was not Tantamount  
to Refusing an Injunction.

Appellant contends that the refusal of the District  
Court to invoke the penalty and forfeiture provisions of  
Section 337 is an interlocutory decision appealable under  
the provisions of Section 1292(a)(1) and (2) of Title 28.  
Appellant seeks to come within Section 1292(1) by claiming  
that his motion was included in a request for an injunction.  
We think his pleadings compel the opposite conclusion.

Appellant's request for an injunction may be found at  
page 5 of his Motion for Relief Pendente Lite. It is clear  
upon reading the motion that the prayer for an injunction  
is only incidental and intended in aid of the principal  
relief sought.

As inciated previously, appellant's argument in  
support of his motion was designed to show that appellee's  
filing of his complaint amounted to a "wrongful dissolution"  
of the partnership under Section 337, and that accordingly

Dissolve for  
Cause "Wrongful  
Dissolution"  
Which is

How will the court  
you can get  
dissolved in  
non-appeal  
from

We want  
to see what  
from it.

U.S.C.?

appellant had the "clear statutory right" solely to own and  
continue the business. <sup>12/</sup> An injunction prohibiting appellee  
from competing within a twenty-five mile area was urged as  
<sup>13/</sup> a device to insure the continuation of operations.

The appropriateness of additional injunctive relief  
was therefore inextricably tied to appellant's prevailing  
on the underlying motion, inasmuch as no independent ground  
was asserted to support such a severe limitation on appellee's  
commercial activities during pendency of suit. Under these  
circumstances we think that the opinion and order of the  
District Court concluding as a matter of law that the mere  
filing of the complaint to dissolve the partnership for  
cause under Section 331 did not work a "wrongful dissolution",  
and that appellant was disentitled to invoke the forfeiture and  
penalty provisions of Section 337, was not tantamount to an  
interlocutory order refusing an injunction. Accordingly, it  
is not reviewable as an exception to the policy of discouraging  
piecemeal appeals. Cf., Baltimore Contractors v. Bodinger, 348

<sup>12/</sup> Motion for Relief Pendente Lite at 2.

<sup>13/</sup> Motion for Relief Pendente Lite at 4.

*(2) find your own  
on the way, but it is  
up to you to make it  
I said this time  
to the new  
game*

U.S. 176 (1955); Morgantown v. Royal Insurance Co., 337 U.S. 254 (1949); Goldstein v. Cox, 90 S. Ct. 671 (1970).

More precisely, the District Court never reached the issue of the propriety of an injunction, because consideration of such further relief could have been undertaken only if the court had held that appellant was statutorily authorized to possess exclusively the business.

B. The Relief Denied to Appellant was not in the Nature of a Receiver.

Appellant also attempts to support appealability by claiming that the relief sought under Section 337 is in reality equivalent to appointing a receiver. Only by blinking reality could such a conclusion be sustained.

It hardly needs emphasis that the penalty and forfeiture provisions available in Section 337 produce vastly different and more drastic consequences than those which flow from the appointment of an impartial receiver. Certainly the application of Section 337 does not perpetuate the status quo so as to preserve equally the rights of both parties while the case is pending before the District Court. Rather Section 337,

if applied at this juncture, would have the effect of unilaterally ousting appellee from the business prior to a hearing on his complaint, which would be manifestly inconsistent with equitable principles. And as much as Section 337 contemplates a complete severance of one partner from the business, it is doubtful whether appellee would have standing to seek ultimate review in the District Court of appellant's management decisions up to the time of trial.

Given the language and obvious purpose of Section 337 we think it applies only where the court concludes, after a full evidentiary hearing, that one party-partner has alone acted wrongfully. To otherwise permit such severe sanctions under the guise of a Pendente Lite receiver in equity would require an expression of legislative intent to subplant and foreclose resort to a receiver to be reflected in the wording utilized in Section 337. We can find no indication that Section 337 was designed to create a substitute remedy, and it is doubtful whether the traditional equity jurisdiction to appoint a receiver could be statutorily circumscribed. See, Dolenga v. Lipka, 195 N.W. 90, 93 (Sup. Ct. Mich. 1923).

Appellant points to Straus v. Straus, 94 N.W. 2d 679 (Sup. Ct. Minn. 1969), in a final effort to show that Section 337 relief is similar to a receiver, but in Straus the court therein was confronted with a prima facie showing of wrongful dissolution and the complaint was not predicated on cause pursuant to Section 331.<sup>14/</sup> As a result the case does not stand for the proposition that without any foundation in fact to support a threshold determination of wrongful dissolution permitting a defendant to continue the business until resolution of the suit is preferable or equivalent to utilizing an objective and impartial receiver to calm hostilities, settle disputes and manage operations.<sup>15/</sup> Cf. Wrenn v. Wrenn, 91 S.E. 2d 267, 268 (Sup. Ct. So. Car. 1956).

---

<sup>14/</sup> See, 94 N.W. 2d at 680-684-5 and discussion in text, infra. at pp. 28-29.

<sup>15/</sup> Appellant's reliance at page 48 of his brief on Phillip v. Von Raven et al., 57 N.Y.S. 701 (Sup. Ct. 1899) as further authority supporting his right to exclude appellee and to continue to operate the business is misplaced. In Von Raven the statute pursuant to which the court afforded interim relief did not require a finding of "wrongful dissolution" as a precondition to excluding one partner. Id. at 702-713. The drafters of the Uniform Partnership Act obviously acted to correct this deficiency and to limit severely the availability of Section 337 type relief. Under these circumstances we hardly think the statute applied in Von Raven is "akin" to Section 337. See, Brief for Appellant, footnote 38, p. 48.



In the context of this appeal, however, it is unimportant that the lower court refused to adopt a similar technique until a hearing on the merits is scheduled. What is significant is the fact that the mechanism suggested, and rejected by the District Court, is not in the nature of a receiver. This circumstance precludes appellant's reliance on 28 U.S.C. §1292(a)(2) as a source of appellate jurisdiction.

C. 28 U.S.C. §1292 (a)(2) Does not Permit an Appeal from a Decision Denying the Appointment of a Receiver.

Even if this Court were to construe the penalty and forfeiture provisions of Section 337 to be tantamount to appointing a receiver, the fact still remains that the lower court denied the relief. 28 U.S.C. §1292 (a)(2) permits an appeal only "from interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof . . ." Had Congress intended to allow appeals from orders denying the appointment of a receiver it could easily have done so. <sup>16/</sup> The conclusion

---

<sup>16/</sup> Cf., Meyers, Whitty & Hodge v. Popich Marine Const., 143 So. 2d 739, 740 (Ct. App. La. 1962).

that Congress did not intend such a result is reinforced by the language utilized in subsection (a)(1) which explicitly authorizes an appeal from an interlocutory order granting or refusing an injunction. See Florida v. United States, 285 F.2d 596 (8th Cir. 1960); Acker v. Skrotsky, 85 A. 2d 277 (App. Div. N.J. 1951); Jones v. Herring, 292 S.W. 296 (Ct. Civ. App. Tex 1927).

In these circumstances the choice of words in subsection (a)(2) must be taken as a deliberate expression of policy to limit review of orders involving receivers to those which grant such relief. No reason has been suggested by appellant why this Court should ignore the plain command of subsection (a)(2) and otherwise undertake an expansive reading of the statute in order to assume jurisdiction.

See Baltimore Contractors v. Bodinger, supra.

IV. EVEN IF APPEALABLE, THE DECISION OF THE DISTRICT COURT HOLDING THAT APPELLANT WAS NOT ENTITLED AS A MATTER OF LAW TO INVOKE THE FORFEITURE AND PENALTY PROVISIONS OF SECTION 337 OF TITLE 41 AS A FORM OF INTERIM RELIEF WAS CORRECT

As indicated earlier, appellee's complaint is grounded on Section 331, which states in pertinent part:

(1) On application by or for a partner the court shall decree a dissolution whenever --

\* \* \*

(d) a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

\* \* \*

(f) other circumstances render a dissolution equitable. (Emphasis added.)

The statute is clear and unambiguous and gives to a partner the absolute right to file suit for dissolution of a partnership for cause. In this regard the District Court implicitly adopted our contention that severe and irreconcilable disagreement and dissension between partners was a sufficient and justifiable reason at common law for a court of equity to decree dissolution, Phillip v. Von Raven et al,<sup>17/</sup>

17/ The Court remarked at pages 701-702:

But as it is plain that there are apparently irreconcilable differences and personal ill will between the partners, rendering any cooperation in the business apparently impossible, a condition exists which is usually deemed sufficient to lead the court to pronounce a dissolution, even though the term of the co- partnership has not expired.

57 N.Y.S. 701 (Sup. Ct. 1899); Singer v. Heller, 40 Wis. 544 (1876); Fooks v. Williams 87 A. 692 (Ct. App. Md. 1913), and that equitable jurisdiction to grant similar relief has been preserved by the drafters of the Uniform Partnership Act and codified locally in Section 331. Owen v. Cohen,<sup>18/</sup> 119 P.2d 713 (Sup. Ct. Cal. 1941); Stark v. Reingold,<sup>✓</sup> 113 A.2d 679, 685 (Sup. Ct. N.J. 1955); Ferrick v. Barry, 68 N.E. 2d 690 (Sup. Ct. Mass. 1946).

We additionally argued to the District Court that the mere filing of appellee's complaint did not itself amount to a "wrongful dissolution" of the partnership under Section 337.

In support of this claim we made three points. First, the acceptance of appellant's allegation that filing a complaint under Section 331, automatically and without more, works a "wrongful dissolution" compels the absurd conclusion that the

---

<sup>18/</sup> In Owen v. Cohen, supra, the lower court granted dissolution, and on appeal its decision was affirmed by the California Supreme Court with the following remarks at page 716:

In our opinion the court in the instant case was warranted in finding from the evidence that there was very bitter, antagonistic feeling between the parties; that under the arrangement made by the parties for the handling of the partnership business, the duties of these partners required co-operation, coordination and harmony; and that under the existent conditions the partners were incapable of carrying on the business to their mutual advantage. As the court concluded, plaintiff has made out a cause for judicial dissolution of the partnership under [paragraphs (c), (d) and (f) of Section 331].

drafters of the Uniform Partnership Act intended to penalize and deter plaintiffs from invoking specific jurisdiction to grant equitable relief by subjecting them to suits for damages.

Second, Section 330 entitled "Causes of Dissolution" expressly states that:

Dissolution is caused:

\*

\*

\*

(6) By decree of Court under section 41-331.

No reference appears in Section 330 to the mere filing of a complaint, and the implication is plain that dissolution is caused by decree and not by the initiation of suit.

Third, we submitted for the District Court's consideration similar cases from other jurisdictions where plaintiffs had moved pursuant to an identical statute for equitable relief by way of an order dissolving a partnership. In each instance the court therein proceeded to consider the merits and offered no suggestion that the respective plaintiffs were consequently liable for damages on account of filing suit or that judicial intervention was an empty gesture because the mere initiation of suit constituted a prior and unilateral act of dissolution.

Fisher v. Fisher, 212 N.E. 2d 222 (Sup. Ct. Mass. 1965);

Owen v. Cohen, supra; Stark v. Reingold, supra; Ferrick v.

Barry, supra.

This is the  
but it is a  
handwritten note

If you take the  
it would then  
you can then  
handwritten note

of the  
cases, in  
unhappy

But there are 4 will

Were there  
partnerships  
for a time of years?

Implication

Appellant, however, sees fit to ignore this logic as well as the literal language of Sections 330 and 331, and instead he relies upon cases not involving the exercise of the court's specific jurisdiction to grant equitable relief for cause as set forth in Section 331 of Title 41. None of the cases cited by appellant stand for the proposition that the filing of a suit under Section 331 itself amounts to a "wrongful dissolution" under Section 337. As the District Court pointed out, the opinion in Clark v. Allen<sup>19/</sup> was rendered only after a full evidentiary hearing which revealed that plaintiff's complaint was groundless. Obviously in the present posture of this case appellant is in no position to arrogate the fact finding function of the District Court and proclaim appellee a wrongdoer. Moreover, the provisions of the Uniform Partnership Act were not in effect at the time of the Clark decision and were, therefore, never considered by the Court.

In both Straus v. Straus<sup>20/</sup> and Napoli v. Domnitch<sup>21/</sup> the

---

<sup>19/</sup> 333 P. 2d 1100 (Sup. Ct. Ore. 1959).

<sup>20/</sup> 94 N.W. 2d 679 (Sup. Ct. Minn. 1959).

<sup>21/</sup> 226 N.Y.S. 2d 908; aff'd and modified, 236 N.Y.S. 2d 549 (1962); aff'd., 248 N.Y.S. 2d 228 (1964).

*If it is  
groundless  
it is  
the  
up  
the*

*They had already dissolved*

respective plaintiffs never invoked the jurisdiction of the court to decree a dissolution for cause under the applicable provision of the Uniform Partnership Act codified locally as Section 331. Each plaintiff had given unequivocal and prior notice to his partners that he considered the partnership to be terminated, and recourse to the court was for confirmation of that fact. Nothing in either opinion derogates from our contention that a partner cannot be forced to "retire" by a belligerent and disputatious associate who is then rewarded with exclusive control of the business. To adopt a contrary theory, as appellant seemingly urges, is tantamount to stripping the District Court of its equity jurisdiction.<sup>22/</sup>

*Is this a valid ground for dissent?*

<sup>22/</sup> Crane and Bromberg in their text on Partnership at page 441 are explicit in confirming that a partner does not subject himself to liability when he seeks equitable relief under Section 331.

*It is safer for the partner having a cause for dissolution, by reason of the co-partner's misconduct or breach of the agreement, to petition a court for a decree of dissolution and accounting. But if he proceeds to exercise self-help in such a situation, and excludes the erring partner or dissolves by notice, he is not liable for damages for his justifiable termination of the partnership agreement.*

*It is safer for the partner having a cause for dissolution, by reason of the co-partner's misconduct or breach of the agreement, to petition a court for a decree of dissolution and accounting. But if he proceeds to exercise self-help in such a situation, and excludes the erring partner or dissolves by notice, he is not liable for damages for his justifiable termination of the partnership agreement.*

Appellant's further argument that the opinion below reads out of the Uniform Partnership Act the right to continue to operate the business of a partnership which has been wrongfully dissolved is circular in nature. The short answer is that a decree of judicial dissolution if predicated on sufficient cause is not "wrongful", and a plaintiff praying for such relief commits no "wrong" under any provision of the Act.

*a*



At this juncture it hardly needs emphasis that appellee is not seeking below a confirmation that he properly dissolved his partnership with appellant, if that partnership be one for "a specified term"; rather appellee is asking the District Court after an evidentiary hearing to exercise its jurisdiction in equity to intervene and dissolve the partnership for cause.

Appellee never has dissolved the business entity, either rightfully or wrongfully - all he did was seek a judicial determination whether the business was a corporation or a partnership and request a dissolution based upon the evidence of intolerable conditions and dissension which made life intolerable for him in his business. The right to seek dissolution in a court of equity is clearly distinguishable from an ex parte wrongful termination - and in this proposition lies the error being urged again here by appellant.

Accordingly, inasmuch as the filing of appellee's complaint did not work a dissolution, let alone a "wrongful" dissolution of the partnership, we submit that the District Court correctly concluded that appellant was not entitled as a matter of law to seek the application of the statutory forfeiture and penalty provisions contained in Section 337.

CONCLUSION

WHEREFORE, appellee respectfully submits that the order of the District Court appointing a receiver should be affirmed, and that appellant's appeal from the order below denying his Motion for Relief Pendente Lite should be dismissed, or, alternatively, that the order should also be affirmed.

DAVID G. BRESS  
THOMAS C. GREEN

1700 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Attorneys for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Brief for Appellee was hand delivered this 12th day of January, 1971, to Messrs. Jacob P. Billig, Norman C. Barnett and Terrence D. Jones, 1108 16th Street, N. W., Washington, D. C. 20036, counsel for appellant.

---

Thomas C. Green

APPENDIX A

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BURTON M. COOPER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2639-70
	)	
LESLIE A. ISAACS,	)	
	)	
Defendant.	)	

AFFIDAVIT

BURTON M. COOPER being first duly sworn, deposes and states:

I am the plaintiff in the above styled case. Contrary to the impression generated by defendant in his belated affidavit submitted to the Court on October 14, 1970, our relationship has progressively deteriorated over the past 6 months to the point where defendant and I have virtually ceased to communicate. As a result, we are presently unable to have a rational discussion over any matter of business policy, and the continuation of operations is thereby threatened.

Our relationship has progressed to this point as a result of increasingly bitter and more frequent disagreement concerning decisions directly relating to the business. This dissension

and discord has existed for over a year, and it has not only had an adverse effect on the business, but it has now infected our personal relationship to the point where the mutual trust and cooperation necessary to continue operations is practically non-existent.

For many weeks the defendant and I have not been able to discuss rationally or resolve the issue of bonus and salary increases to five employees, some of whom are critical to the continuation of operations. Defendant's rigidity, in what little conversation we were able to have, prevented our reaching agreement on any of the employee increases. Because of this circumstance three key employees came to me and threatened to seek new employment if not provided an increase within a short period of time.

Defendant was content to let this condition continue with its inevitable, deleterious effect on the business, and he gave no evidence of reconsidering his initial position with regard to the matter of raises until after our appearance in court on October 14, 1970.

On the afternoon of that date, it became imperative to reach a decision with regard to the disputed raises and bonuses in order to prevent the departure of the three key employees,

referred to above. Late that afternoon concessions were made and the issue was temporarily resolved.

Apart from the increasing intensity of personal hostilities as time passes, disagreement and dissension over many matters still persist, and we have been unable to reconcile our views on basic business policies. Prior to the time we ceased to communicate there were constant and frequent arguments over the amount of inventory retained on hand. Defendant's management of stock occasionally produced shortages that resulted in cancelled orders and lost business. Although this circumstance still continues, I have not been able to discuss with defendant alternate methods of inventory control, because in our conversation he inevitably becomes emotional, irrational and disputatious. Furthermore, the salesmen have frequently and consistently voiced their concern over the shortages in important and profitable items of inventory. These shortages are impairing the customer-salesman relationship, upon which the success of the business vitally depends.

Defendant and I have also had serious and frequent arguments over his procurement, supervision and utilization of employees. For the past year he has refused to consider

my suggestions that employees could be used more efficiently in certain operations and that several employees were hired without proper investigation of their qualifications and without suitable inquiry into their prior employment. As a result of defendant's attitude I have found it useless to converse on other matters of employee relations. For example, all attempted discussions concerning employee fringe benefits have ended in acrimony, with the result that several major fringe benefits are presently unavailable to our employees. In my opinion, the absence of these benefits seriously jeopardizes the continued retention of our employees and definitely puts us at a competitive disadvantage in hiring new personnel.

The defendant and I have had further serious disagreement over the replacement and purchase of physical equipment to be used in the business. Because of our personal differences decisions relating to these matters have become practically impossible. In particular, we have had heated and protracted arguments over the acquisition of a data processing system for the business. From time to time, we have attempted to discuss the adoption of such a system, but defendant has continuously refused to consider seriously my proposal for a feasibility survey by an impartial specialist. Discussion of this topic

is now impossible without the defendant's becoming agitated and vehement.

In attending the recent convention of the International Sanitary Supply Association, the defendant and I travelled to the convention separately for the first time in approximately seven years. During the convention we had only accidental contact. Because of our mutual, personal animosity, we did not together engage in discussion with manufacturers of new product lines, nor did we converse together with any distributors as had been done in the past and as is essential for business success. Our dissension prevented our joint examination of new items and an interchange of information with other distributors. It also precluded the cooperation necessary to make important decisions affecting the future conduct of operations.

The unwholesome condition of our relationship resulting from this type of discord and dissension has been further aggravated by instances of volatile conduct on the part of the defendant. On several occasions during attempts at discussion, defendant's behavior has become highly emotional and agitated.

At one such instance, defendant registered his disagreement by forcefully striking my desk with his open palm. On another occasion he broke a board located in the warehouse on which truck route tickets were maintained. This behavior has



produced in me veritable apprehension for my personal safety, and it has deterred me from seeking to communicate with defendant over matters of business policy where I suspect a vigorous controversy may occur. As a result, there are times when important business decisions go unresolved.

Defendant, in a prior affidavit has recited the severe injury which will occur to the business if relief is not forthcoming from the Court. In my opinion, only the appointment of an independent, impartial court representative can now prevent those disastrous consequences. The bitter relationship currently existing between us is now only alleviated when one of us deliberately departs from the premises. If the condition of discord and dissension is left to run its course, all that each of us has worked for will be lost to both.

/s/ Burton M. Cooper  
Burton M. Cooper

Subscribed and Sworn to  
Before Me this 16th day  
of October, 1970

/s/ Darlene Raymonds

Notary Public

My Commission Expires December 31, 1974.

APPENDIX B

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BURTON M. COOPER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2639-70
	)	
LESLIE A. ISAACS,	)	
	)	
Defendant.	)	

AFFIDAVIT OF BURTON M. COOPER

District of Columbia : ss

Burton M. Cooper, being first duly sworn according to law, deposes and says that he is the plaintiff in the above entitled cause, and he regrets the need to file this affidavit for relief - particularly because there are pending motions under advisement by the Court.

Affiant has previously sworn to affidavits setting forth facts indicating sharp dissension, discord, and differences between him and the defendant Isaacs, and he is aware that some of the facts so asserted by him have been denied by said defendant. Affiant reiterates that facts heretofore sworn to by him are the full truth and but for the emergency which currently exists affiant would not be filing this additional affidavit.

At about 4:30 p.m. on yesterday, November 10, 1970, Isaacs angrily protested a decision that I had made not to purchase a calculator for about \$750. Because of his loud and insulting language, I picked up my tape recorder dictation unit and pointed it toward him so that he could see that his attitude would be recorded and thereby confirm what I have previously stated. Upon my doing so, he became furious, threatened to take the recorder from me, and came around my desk with both hands outstretched and surrounded my head with his two hands, putting me in immediate fear of possibly being choked or struck, and then reaching across my body, forcibly removed the tape recorder from my left hand.

The foregoing incident does not stand alone. There have been other incidents, not quite so clear, in which his threatening voice and his manner placed me in apprehension of bodily harm.

At 5:15 p.m. on yesterday, after the foregoing incident and after he had sent the dictation unit back to my office, and one of our leading salesmen having given notice of his intention to resign, Isaacs again came to my office and said "Well, what now?", to which I replied "Leave me alone. I am not going to talk to you. Either you walk out of my office or I'll use the

dictation recorder again." He replied "I'll take it away from you again and I'll jam it down your throat.", to which I replied "If you weighed 90 pounds less you wouldn't speak like that." His answer was "I'll lose the weight you ain't got the guts of a worm." I used the intercom to call a secretary and when she came he left immediately.

I reported the above incident to my attorney, who recommended either going to the U.S. Attorney's office to file a complaint or submit the matter to this Court, and finally concluded on the latter course.

I urgently request the Court for physical protection pending litigation. My health is being increasingly impaired by the conditions in the business and the hostility and threatening attitude of the defendant. Since the suit in this case was filed in August, I have lost considerable weight and on recent medical examination, my physical decline was attributed by my doctor to the conditions in which I have to work.

/s/ Burton M. Cooper

Subscribed and sworn to before  
me this 12th day of November, 1970.

/s/ Clerk of Court



IN THE

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,807

---

LESLIE A. ISAACS,  
*Appellant.*

v.

BURTON M. COOPER,  
*Appellee.*

---

APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

REPLY BRIEF OF APPELLANT

---

JACOB P. BILLIG  
TERRENCE D. JONES

1108 16th Street, N.W.  
Washington, D.C. 20036

*Attorneys for Appellant*

January 18, 1971



TABLE OF CONTENTS

	<u>Page</u>
Introductory Statement	1
ARGUMENT IN REPLY	
A. Appellee, Significantly, Has Not Even Addressed the Central Issue Presented Herein -- Whether the Partnership Agreement May Be Breached with Impunity by Appellee or Rescinded by the Court	2
1. The Issue Argued by Appellee as to Whether He Can Be Required or "Forced" to Retire Is Not Presented, Since This Is What He Seeks to Do Upon Disposition of the Merits of the Complaint	2
2. The Issue Which Is Presented Is Whether Appellee Is Required to Retire in the Manner Provided in the Partnership Agreement	4
3. No Grounds Have Even Been Alleged by Appellee to Justify His Breach or a Court Rescission of the Partnership Agreement	5
B. Appellee's Breach of the Contract (and Not Any "Typographical Error" in His Complaint) Entitles Appellant to the Section 337 Relief Which He Requested	11
1. Even If Section 331 Had Been Set Forth in the Complaint, Appellee's Requested Relief Would Still Have Been in Contravention of the Agreement	11
2. Nor Does Appellee's Allegation of "Irreconcilable Differences" Immunize Him From Section 337, as He Alleges	13

	<u>Page</u>
C. The Lower Court's Error in Appointing The Receiver Is Not Redeemed by His "Assuming a Low Profile," Which in Any Event Has Not Been the Case	17
D. Both the Orders of the Lower Court Granting Appellee's Request for the Appointment of a Receiver and Denying Appellant His Requested Section 337 Relief Are Here Reviewable	20
1. Both Requests Are Not Only Inextricably Related, But Also Mutually Exclusive.	
2. The Jurisdiction of This Court Plainly Extends to the Section 337 Order Which Is Basic to the Order Appointing the Receiver	21
3. Appellee's Argument Concerning "Piece-meal Appeals" Is Here Plainly Inapposite	23
CONCLUSION AND REQUEST FOR EXPEDITED HEARING	25
Certificate of Service	26

TABLE OF CASES

	<u>Page</u>
Allstate Insurance Co. v. McNeill, 382 F. 2d 84 (4th Cir. 1967) . . . . .	22
Belleair Hotel Co. v. Mabry, 109 F. 2d 390 (C.C.A. Fla. 1940) . . . . .	18
Clark v. Allen, 333 P. 2d 1100 (Sup. Ct. Ore. 1959) . . . . .	16
Collins v. Lewis, 283 S.W. 2d 258 (Tex. 1958) . . . . .	11
Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) . . . . .	22
Devex Corp. v. Houdaille Industries, Inc., 382 F. 2d 17 (7th Cir. 1967) . . . . .	22
Healey v. Steele, 13 P. 2d 140, 141 (1932) . . . . .	13(a)
Hurwitz v. Directors Guild of America, Inc., 362 F. 2d 67 (2d Cir. 1966) . . . . .	22, 23, 24
Josephthal v. Gold, 171 N.Y.S. 1041. . . . .	11
*Karrick v. Hannaman, 168 U.S. 328. . . . .	11
*Klass v. Yavitch, 203 Ill. App. 229, 23 N.E. 2d 936 (1939) . . . . .	19
Moffett v. Pierce, 24 A. 2d 448, 450 (1942) . . . . .	13(a)
*Napoli v. Domnitch, 226 N.Y.S. 2d 908 (1962), <u>modified</u> , 236 N.Y.S. 2d 549 (1962), <u>aff'd</u> , 248 N.Y.S. 2d 228 (1964) . . . . .	10, 12, 14-16
*Potter v. Brown, 328 Pa. 557, 195 A. 901, 904 (1938) . . . . .	13

	<u>Page</u>
Rutland Marble Co. v. Ripley, 10 Wall 339. . . . .	11
Societe Internationale v. McGrath, 180 F. 2d 406 (D.C. Cir. 1950) . . . . .	22
Stoner v. Hannan, 113 Mont. 210, 127 P. 2d 233 (1942) . . . . .	13(a)
*Straus v. Straus, 94 N.W. 2d 679 (Sup. Ct. Minn. 1959). . . . .	12, 14, 16
Tornances v. Melsing Alaska, 109 F. 710 (1901). . . . .	22

---

\*Cases chiefly relied upon are marked by asterisks.

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,807

---

LESLIE A. ISAACS,  
Appellant,

v.

BURTON M. COOPER,  
Appellee.

---

Appeal from Orders of the United States District Court  
for the District of Columbia

---

REPLY BRIEF OF APPELLANT

---

Introductory Statement

Appellant will not reply in detail herein to each of the arguments made by appellee in his brief of January 12, 1971. Since appellee's arguments and authorities were for the most part set forth in his prior papers filed in this Court and in the court

---

1/ Motion for Summary Affirmance of Order of District Court, and Motion to Dismiss Appeal from Order of the District Court and Memoranda in support thereof.

below, appellant was able to anticipate and, in effect, respond to such arguments as well as distinguish appellee's authorities in his brief of December 28, 1970. Accordingly, the fact that no comment is made in this brief with respect to arguments or authorities relied upon by appellee in his January 12, 1971 brief does not indicate any acquiescence by appellant that they are in any way dispositive of the issues raised by this appeal.

ARGUMENT IN REPLY

A. Appellee, Significantly, Has Not Even Addressed the Central Issue Presented Herein -- Whether the Partnership Agreement May be Breached with Impunity by Appellee or Rescinded by the Court.

1. The Issue Argued by Appellee as to Whether He Can Be Required or "Forced" to Retire Is Not Presented, Since This Is What He Seeks to Do Upon Disposition of the Merits of the Complaint.

Appellant has shown in his opening brief that the lower court's appointment of the receiver, as well as its denial of appellant's requested Section 337 relief, was erroneous and requires reversal because the relief sought in the complaint upon disposition of the merits of the case is in contravention of the partnership agreement which appellee acknowledges governed the conduct and continuation of his partnership business

with appellant. (See Appellant's Opening Brief, pp. 21-29, 31-43) It is significant that no reply is actually made by appellee to this contention in his brief. Instead, appellee argues only that the facts which he alleges set forth a basis for petitioning the court "to afford relief to a partner whose associate makes life together intolerable and impedes participation in the business."<sup>2/</sup> Appellee also alleges that it is unfair for him to have to depart the business and leave operations in the exclusive control of appellant, since "the pending evidentiary hearing on the merits may reveal appellant's conduct to be the underlying and sole cause of the dissension and discord now existing between the parties."<sup>3/</sup>

But appellee would here have this Court overlook the fact that the sole relief requested in his complaint is "to depart the business",<sup>4/</sup> by securing a court dissolution and liquidation thereof. Appellee would also have this Court overlook the fact that the partnership agreement specifically provided for a means

---

<sup>2/</sup> Appellee's Brief, p. 16.

<sup>3/</sup> Id., at p. 15.

<sup>4/</sup> Appellee states in his complaint that this action has been filed by him to --

"effectuate a dissolution of said partnership and to have its business wound up and liquidated according to law by paying all creditors and then dividing any surplus between them."  
(p. 2)



by which appellee could at any time "depart the business" and receive an agreed-upon value for his interest therein, and that in such event, appellant was to have the right to exclusively continue its operations.<sup>5/</sup>

2. The Issue Which Is Presented Is  
Whether Appellee Is Required to  
Retire in the Manner Provided in  
the Partnership Agreement.

Hence, the issue before the Court is not whether<sup>6/</sup> appellee should be required, or "is being forced" to "depart the business." This is what appellee himself has requested to be able to do in his complaint. Nor is any issue presented, as appellee nevertheless argues in his brief, as to whether he may file a suit merely to "depart the business," without incurring the penalty provisions of Section 337 of the Uniform Partnership Act, since the partnership agreement had already given appellee the right to do so without the necessity of instituting any suit.

---

<sup>5/</sup> See Partnership Agreement, par. 14, pp. 9-11, attached to Complaint and reproduced in the Appendix to appellant's December 28, 1970 brief.

<sup>6/</sup> Appellee's Brief, p. 29.

The sole issue here presented, appellant respectfully submits, is whether on the basis of the facts which appellee has alleged, he may seek to "depart the business" in a manner other than that provided for in the partnership agreement, by securing a court-ordered dissolution and liquidation, and in so doing defeat the right accorded to appellant in the partnership agreement to continue the business. Stated otherwise, the issue here presented is whether appellee was bound by the partnership agreement in seeking to achieve the stated objective of his suit -- his withdrawal from the partnership and the securing of the value of his interest therein.

3. No Grounds Have Even Been Alleged by Appellee to Justify His Breach or a Court Rescission of the Partnership Agreement.

---

Appellant submits that even if it is assumed arguendo that all of the facts which appellee has alleged are true, he is nevertheless bound by his agreement. Thus, the fact that appellee has had irreconcilable differences with appellant does not entitle appellee to retire in a manner other than that in which he warranted in the partnership agreement he would retire -- even if it were further assumed arguendo that it could be shown upon the merits, as appellee alleges in his brief, that

it is appellant's conduct which is "the underlying and sole cause of the dissension and discord."<sup>7/</sup> No contention is made by appellee that the partnership agreement was entered into as a consequence of fraud or mistake or that there are any other reasons which would support its equitable rescission -- which in essence is what appellee is here seeking. Nor are any allegations made by appellee which would support a finding that appellant's conduct has been such that it would not be equitable to require enforcement of the governing provisions of the partnership agreement with respect to the manner in which appellee should retire from the business. Appellee does not allege, it is also noted, that appellant has been guilty of any breach of his partnership duty. The judicial relief requested by appellee is sought solely --

---

<sup>7/</sup> In his complaint, appellee did not allege that appellant was the party responsible for any "dissension and discord." Such allegations were made for the first time in appellee's October 16, 1970 and November 12, 1970 affidavits, attached in the Appendix to his brief. These allegations, to the extent that they seek to show that appellant is the party responsible for any "discord and dissension," are denied by appellant and, contrary to appellee's assertion at page 12 of his brief, the lower court clearly did not rely upon them since it found that "it does not at this time place the fault on one party or the other." (Memorandum Opinion of lower court, p. 9)

In addition, it is noted that all of the alleged matters set forth in appellee's November 12, 1970 affidavit, attached to his brief as Appendix B, purportedly transpired after the dissolution of the partnership by the filing of the suit on September 3, 1970. Hence, even if such matters were true, which they are not, they would be irrelevant to any disposition of this proceeding.

"Because of irreconcilable differences which have arisen and persisted between said partners [appellant and appellee] so that they have been and are unable to agree on policies of the business and their respective roles in it...." 8/

But the possibility of "irreconcilable differences with respect to policies of the business and their [the partners'] respective roles in it," upon which appellee is solely relying, clearly was within the contemplation of the parties when they entered into the partnership agreement, which expressly provided that --

"The Partners shall have equal rights in the management of the Partnership business...." 9/

And because of the recognized possibility of "irreconcilable differences" arising between them which might make their continued participation in the business unattractive to either or both of them, the parties further provided in their agreement 10/ that each one could retire at any time, sell his interest in the partnership to a third party (but subject to the overriding option of the other partner to buy such selling partner's interest), 11/ or that the parties could mutually dissolve the

---

8/ Complaint, par. 3, p. 2.

9/ Partnership Agreement, par. 9, p. 3, attached to Complaint set forth in appendix to appellant's December 28, 1970 brief.

10/ Id., par. 14, pp. 9-11.

11/ Id., par. 12, pp. 4-8.

partnership.<sup>12/</sup> Thus, the parties fully provided for a "bail-out" in the event of "irreconcilable differences," which would permit them to retrieve their interest in the business upon terms and conditions which at the time of the agreement they considered to be just and reasonable. More importantly, the parties further provided that where only one partner elects to "bail-out," the other may nevertheless alone continue the operation of the business.<sup>13/</sup>

Appellee now apparently feels that the value of his interest in the partnership, derived under the partnership agreement formula,<sup>14/</sup> would be less than what he would receive upon a court-ordered dissolution and liquidation, and for this reason has elected to sue for dissolution and liquidation, rather than retire under the agreement. Thus, appellee states in his brief --

"The partnership agreement contains a mathematical formula to calculate the value of the retiring partner's share of the business. Contrary to appellant's assertions the amount which would be owing under such formula were appellee to retire, is far less than the figure

---

<sup>12/</sup> Id., par. 13, pp. 8-9.

<sup>13/</sup> Id., par. 14, p. 9. As stated at page 1 of appellant's affidavit of November 13, 1970, filed in this Court, this provision was considered essential to protect not only appellant's capital invested in the business, but the years of effort invested therein as well.

<sup>14/</sup> Id., par. 12, pp. 4-8, incorporated into par. 14 (see p. 9).

appellee would receive from a sale of the business to a third party. ...." 15/

While appellant disputes that a greater value for appellee's interest could be received upon a dissolution sale, even if appellee were correct in this respect, it obviously would not justify appellee's breaching the partnership agreement, as appellee has done by seeking to secure his interest in the partnership business in a manner not provided for in the agreement and which would defeat appellant's right to continue the business. And it is equally obvious that the fact that appellee believes that a greater price for his share of the business could be secured through a court-ordered dissolution and liquidation does not justify a court-ordered rescission of the partnership agreement, which in effect would be required in order to grant appellee his sought relief. In this respect, it is significant to note that the partnership agreement itself recognized that a greater price conceivably could be secured from a third party than under the formula fixed in the agreement for determining the price at which the remaining partner may exercise his overriding option

---

15/ Appellee's Brief, p. 16, footnote 11.

to buy his partner's share. Yet, the agreement expressly provides that if the price offered by a third party is greater, the remaining partner shall nevertheless have the right to buy the interest at the lesser contract price. (See Partnership Agreement, par. 12, p. 6)

That appellee is here bound by the partnership agreement is self-evident contract law. However, the case of Napoli v. Domnitch, 226 N.Y.S. 2d 908 (1962), modified, 236 N.Y.S. 2d 549 (1962), aff'd, 248 N.Y.S. 2d 228 (1964), cited by appellant in his December 28, 1970 brief and involving, insofar as here pertinent, virtually identical contract provisions, confirms this to be the case. Significantly, no attempt is made by appellee in his brief to distinguish or comment upon this controlling Napoli case with respect to this principle for which it has been cited -- that appellee is bound by the retirement provisions of the contract which are breached by the filing of a suit for dissolution.<sup>16/</sup>

---

<sup>16/</sup> At pp. 28-29 of his brief, appellee comments with respect to Napoli only that the plaintiff therein "never invoked the jurisdiction of the court to decree a dissolution for cause under the applicable provisions of the Uniform Partnership Act." This abortive attempt at distinction will be hereinafter discussed.



B. Appellee's Breach of the Contract (and Not Any "Typographical Error" in His Complaint) Entitles Appellant to the Section 337 Relief Which He Requested.

1. Even If Section 331 Had Been Set Forth in the Complaint, Appellee's Requested Relief Would Still Have Been in Contravention of the Agreement.

Appellee in his brief seeks to create the impression that appellant's case is premised upon appellee's alleged inadvertent typographical error in the complaint, wherein purportedly Title 41 D.C. Code Section 330 jurisdiction was mistakenly cited, instead of Title 41 D.C. Code Section 331. Appellant trusts that it is obvious to the Court from its opening brief that this is not the case. Appellee's sought relief would be in contravention of the partnership agreement and could not be granted, irrespective of whether Section 330 or Section 331 had been typed into the complaint. In either case, appellee would be asking the court, as noted above without any justification, to assist him in contravention of his agreement with appellant to procure a dissolution of the partnership. This, the authorities plainly indicate a court may not do. Karrick v. Hannaman, 168 U.S. 328; Rutland Marble Co. v. Ripley, 10 Wall 339, 358; Josephthal v. Gold, 171 N.Y.S. 1041; Collins v. Lewis, 283 S.W.2d 258 (Tex. 1958).

The allegation not only of Section 330 jurisdiction, but appellee's allegation in the complaint that he has an "absolute right to dissolve" the partnership, and consistent therewith his failure to make any allegations which would support an equitable dissolution, was noted in appellant's December 28, 1970 brief to show that appellee himself at the time of the filing of his action did not conceive that he had "cause" to dissolve the partnership. Moreover, appellee in his brief seeks to distinguish the controlling cases of Straus v. Straus, 94 N.W.2d 679 (Sup.Ct. Minn. 1959), and Napoli v. Domnitch, supra, on the specious grounds that the respective plaintiffs therein (as in fact is the case of appellee) "never invoked the jurisdiction of the court to decree a dissolution for cause under the applicable provisions of the Uniform Partnership Act codified locally as Section 331." (Appellee's Brief, pp. 28-29) But even if Section 331 had been cited by the plaintiffs in Straus and Napoli, no other result would have obtained. In either case, the plaintiffs were seeking relief in contravention of the agreement. The mere allegation of one statute instead of another in the complaint certainly would not overcome this insuperable obstacle to relief.

2. Nor Does Appellee's Allegation of  
"Irreconcilable Differences" Immu-  
nize Him From Section 337, as He  
Alleges.

In seeking to avoid the consequences of Section 337, appellee contends in effect that his allegation of "irreconcilable differences" with appellee immunizes him against any invocation of this statute. Thus, appellee argues that such "irreconcilable differences," if proven at trial, would constitute cause for dissolution under Section 331 and, therefore, the filing of a suit seeking dissolution because of irreconcilable differences could not be "wrongful." However, appellant has shown in his opening brief that "irreconcilable differences" alone are not as a matter of law a proper basis upon which to order the dissolution of a going, prosperous business which has been established for a specific term. As stated by the court in Potter v. Brown, 328 Pa. 557, 195 A. 901, 904 (1938):

"Equity is not a referee of partnership quarrels. A going and prosperous business will not be dissolved merely because of friction among the partners; it will not interfere to determine which contending faction is more at fault".

See also, Moffett v. Pierce, 24 A. 2d 448, 450 (1942); Healey v. Steele, 13 P. 2d 140, 141 (1932); Stoner v. Hannan, 113 Mont. 210, 127 P. 2d 233 (1942).

No authorities are cited by appellee in his brief in support of the proposition that irreconcilable differences are cause for dissolution, which were not discussed and distinguished in appellant's December 28, 1970 brief. As indicated at pages 12-14 of that brief, the filing of the action for dissolution in the cases relied upon by appellee involved, unlike the situation here, wrongful conduct by the defendant partner in breach of his partnership duty, or partner-

ships at will. Hence, it is not surprising, as stated by appellee, that the courts deciding those cases "offered no suggestion that the respective plaintiffs were consequently liable for damages on account of filing suit or that judicial intervention was an empty gesture because the mere initiation of suit constituted a prior and unilateral act of dissolution." (Appellee's Brief, p. 27)

It is also here noted that, contrary to appellee's argument at pages 28-29 of his brief, "irreconcilable differences" were alleged in Straus v. Straus, <sup>17/</sup>supra. Nevertheless, the provisions of Section 337 were deemed applicable. Hence, it is clear from Straus that the mere allegation of irreconcilable differences does not immunize against Section 337 relief. <sup>18/</sup>For that matter, one must assume that "irreconcilable differences" are always present whenever a suit for dissolution is filed, since otherwise the parties would not have resorted to litigation. For example, in Napoli v. Domnitch, supra, there were obviously irreconcilable differences between the partners at

---

<sup>17/</sup> See 94 N.W.2d 686.

<sup>18/</sup> The Straus opinion by the Minnesota Supreme Court is entitled to great weight in fulfillment of the mandate of the statute calling for uniform interpretation and application of the Uniform Partnership Act. (See 41 D.C. Code §303(4)) The same is true of Napoli v. Domnitch, supra, similarly decided under the Uniform Partnership Act.

least with respect to the manner in which the partnership there involved should be terminated, or otherwise the suit therein would not have been filed. Nevertheless, the court held in Napoli as well that the filing of the action to dissolve was wrongful. Thus, to hold that "irreconcilable differences" excuses or immunizes a plaintiff who files a suit for dissolution from the application of Section 337 would negate entirely the existence of this statute.

Further, even if "irreconcilable differences" could under certain circumstances be considered to be a "cause" for dissolution, appellee has cited no authority which holds that this is so where, as here, the partnership agreement provides for each partner to secure the objective of a dissolution suit by retiring under the agreement, and that the remaining partner shall be entitled to continue the business, notwithstanding one partner's retirement. As shown above, appellee has not even addressed himself to the question of how he possibly could have any "cause" for dissolution in light of the retirement provisions of the partnership agreement. Obviously, appellee has no "cause" upon which he can here rely.<sup>19/</sup>

It is finally noted that the fact that appellee asked the court in his complaint to decree a dissolution for cause

---

<sup>19/</sup> Appellee's reliance upon Crane and Bromberg's passage from their text on Partnership at page 29, footnote 22, is, therefore, plainly inapposite. As indicated by the text cited by appellee, the comment made by the authors was intended to be applicable only to "the partner having a cause for dissolution." (Emphasis added)

does not avoid the application of Section 337. As the court held in Napoli v. Domnitch, in very similar circumstances, the filing of a suit for dissolution is a plain and simple breach of the agreement -- notwithstanding that the complaint asks the court to decree the dissolution.<sup>20/</sup> This is the holding not only of Napoli, but Clark v. Allen, 333 P.2d 1100 (Sup.Ct. Ore. 1959), and Straus v. Straus, supra, as well. As shown in appellant's December 28, 1970 brief at pages 34-35, the conclusion that the filing of a suit for dissolution causes a dissolution of the partnership is consistent not only with law,<sup>21/</sup> but with the realities of the partnership relationship as well. To deny the application of Section 337 in order to preserve a party's right to so breach a partnership agreement, as appellee argues should be done, would be ludicrous and certainly could not have been within the contemplation of the drafters of the Uniform Partnership Act or the Congress which enacted it into law in the District of Columbia.

---

<sup>20/</sup> As indicated at pp. 27-28 of appellant's opening brief (footnote 20), in Napoli 337 relief was denied on appeal because the partnership there involved was one at will, and not for a specific term. See, 236 N.Y.S. 2d 549 (1962); aff'd 248 N.Y.S.2d 228 (1964).

Appellee herein, however, has not disputed in his brief the showing made by appellant in his brief at pp. 36-41, that the subject partnership between him and appellant is for a specific term.

<sup>21/</sup> As indicated in Straus at 94 N.W.2d 685, under the Uniform Partnership Act the institution of a suit alone seeking court dissolution causes an immediate dissolution of the partnership. Appellee, however, had not only filed the suit for dissolution, but as in Straus, supra, and Napoli, supra, had also previously served notice upon appellant of his intention to do so. (See Complaint, p. 2)



C. The Lower Court's Error in Appointing the Receiver Is Not Redeemed by His "Assuming a Low Profile," Which in Any Event Has Not Been the Case.

At page 14 of his brief, appellee argues that the receiver appointed by the court in this matter is not objectionable because "whatever incremental detriment his activities may generate it can be minimized if the parties' conduct will allow the receiver to assume a low profile." Appellee goes even further to assert in footnote 10 on that same page that --

"While we styled our request below as a motion for Appointment of Receiver, we did not envision or urge that management or control of the business be turned over to the Court's representative. Rather, we attempted to suggest a form of relief to meet the problem to facilitate communication between the parties so as to prevent acts of violence and to resolve disputes about management, thereby permitting the parties themselves to continue to operate the business as far as practicable. And that is what has taken place. As a result, the function of the 'receiver' in the context of this case is more analogous to the role of a referee or peace-keeper than one whose presence signifies 'a sign of death and incompetence.' Brief for Appellant at p. 18. Because the receiver in this case does not operate the business nor have title to its property nor make contracts for it, his presence represents a slight intrusion into the affairs of the business and undoubtedly serves as a catalyst to promote the continuation of operations pending trial. The District Court wisely fashioned relief to meet a vital need."

Apparently, appellee did not recall in making the above statement that the order which he himself filed with the lower court, and which was ultimately signed by the court, gave the

receiver the "full power to direct and control" the operations of the business of the partnership.<sup>22/</sup> Further, as appellee must be fully aware, the receiver since his appointment has, in fact, exercised his authority to direct and control virtually every aspect of the business in preemption of the right of appellant to exercise his control and dominion over the property and business of the partnership.<sup>23/</sup> These activities of the receiver have included: determining the amount of money to be held by the partnership business and the amount to be drawn by the partners; the retention in his own name, as receiver for the business, of funds of the partnership; the manner in which tax returns shall be filed by the partnership; the purchase of office equipment; the solicitation of customers and the assignment of customer accounts to salesmen; and the retaining and discharging of personnel of the business.<sup>24/</sup>

---

<sup>22/</sup> See Appendix to appellant's December 28, 1970 brief.

<sup>23/</sup> In any event, review of the appointment of a receiver must be based upon the scope of the power given to the receiver and not upon the specific acts taken thereunder up until the time of filing of briefs in the appellate court, particularly since the specific acts taken by the receiver pursuant to his authority are generally not appealable. Belleair Hotel Co. v. Mabry, 109 F.2d 390 (C.C.A. Fla. 1940).

<sup>24/</sup> Appellee does not contend that these actions of the receiver, which were within the scope of the lower court's order, are improper. What is improper are not the receiver's actions, but the lower court's order which authorized them.

Hence, the observation of the court in Klass v. Yavitch, 203 Ill. App. 229, 23 N.E.2d 936 (1939), that receiverships are to be avoided at all possible cost because it is a "serious interference with the rights of the citizen, without the verdict of a jury and before a regular jury," is fully applicable to the situation herein. In addition, the appointment of the receiver is seriously penalizing both employee morale and the continued competitive ability of the partnership business. Valued personnel have left, and still others have given notice of their intention to leave, the employ of the business. In addition, appellant has specific knowledge that the fact of the receivership is being utilized by competitors to draw customers away from the partnership business. Hence, the disastrous effects of receivership, which all of the authorities cited by appellant in his opening brief <sup>25/</sup>recognized would inevitably flow from a receivership over a prosperous business, are now being felt by the partnership business as a consequence of the action of the lower court. Immediate reversal of such action is, therefore, imperatively required.

---

<sup>25/</sup> Appellant's December 28, 1970 Brief, pp. 15-20.

D. Both the Orders of the Lower Court Granting Appellee's Request for the Appointment of a Receiver and Denying Appellant His Requested Section 337 Relief Are Here Reviewable.

1. Both Requests Are Not Only Inextricably Related, But Also Mutually Exclusive.

In addition to the substantive arguments made by appellee in his brief, he also urges that the order of the lower court denying appellant's requested Section 337 relief is not applicable. However, appellee does not contend that the order of the District Court appointing a receiver pendente lite is not appealable. Clearly, 28 U.S.C. §1292(a)(2) allows interlocutory appeals of such orders. Appellee's only argument is that the court's order denying appellant's request for pendente lite relief under 41 D.C. Code Section 337 and for injunctive relief is not appealable at this time. It is impossible, however, for this Court to review the District Court's order appointing the receiver without considering the arguments of appellant that his request for relief under 41 D.C. Code Section 337 should have been granted. The two requests for relief are not only inextricably related, but mutually exclusive. For example, one of appellant's arguments in opposition to the appointment of the receiver is that the lower court erred in appointing the receiver because appellant, as a matter of law, under 41 D.C. Code

Section 337, is entitled to carry on the business of the partnership pending the outcome of this litigation. In granting appellee's request for the appointment of a receiver, the lower court of necessity was required to deny appellant's relief.

Upon review, should this Court find that appellant is entitled to relief under Section 337, then by necessity it must find that the District Court erred in appointing a receiver. Conversely, if this Court finds that the appointment of a receiver was proper, then it must determine that the requested relief under Section 337 was properly denied. Hence, this Court cannot review the District Court's order granting appellee's motion to appoint a receiver without considering the lower court's simultaneous and mutually exclusive denial of appellant's request that he be permitted to carry on the business of the partnership pursuant to 41 D.C. Code Section 337.

2. The Jurisdiction of This Court Plainly  
Extends to the Section 337 Order Which  
Is Basic to the Order Appointing the  
Receiver.

It has long been held that the jurisdiction of the Court of Appeals in reviewing interlocutory orders under 28 U.S.C. 1292 is not limited solely to the order upon which the appeal is based, but extends to such other orders and determinations, although

interlocutory and non-appealable in themselves, which are basic to or underlie the order supporting the appeal. Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); Societe Internationale v. McGrath, 180 F.2d 406 (D.C. Cir. 1950); Allstate Insurance Co. v. McNeill, 382 F.2d 84 (4th Cir. 1967); Devex Corp. v. Houdaille Industries, Inc., 382 F.2d 17 (7th Cir. 1967). See also 9 Moore, Federal Practice, ¶110.25[1]. Clearly, the District Court's order denying the Section 337 relief is basic to and underlies the order granting appellee's request for a receiver since, as noted above, the two forms of relief are both inextricably related and mutually exclusive. In addition, as noted, the same fact relied upon by appellant, that the relief sought by appellee is in contravention of the agreement, establishes both that the lower court erred in appointing the receiver as well as in denying appellant his requested Section 337 relief.

Indeed, this appeal presents a classic case for this Court to not only review the interlocutory orders, but also to decide the merits of the case. In Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir. 1966), the Second Circuit upon reviewing the District Court's denial of a preliminary injunction decided that the plaintiff on the basis of admitted facts of record was, as a matter of law, entitled not only to relief pendente lite but to judgment on the merits.<sup>26/</sup> Professor Moore, commenting on the Hurwitz decision, noted:

---

<sup>26/</sup> See also, Tornances v. Melsing Alaska, 109 F. 710 (1901).

"Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there.... To be sure, the circumstances were unusual, but the decision stands for the larger proposition that once a case is lawfully before a court of appeals, it [the court] does not lack power to do what plainly ought to be done."  
9 Moore, Federal Practice, ¶110.25[1]

Here, as in Hurwitz, appellant's contention is that on the basis of admitted facts of record, he is entitled to relief pendente lite and permanently under Section 337.

3. Appellee's Argument Concerning  
"Piecemeal Appeals" Is Here Plainly  
Inapposite.

Appellee also argues that the allowance of an appeal from the District Court's denial of appellant's requested relief would violate the policy against piecemeal appeals. But appellee overlooks the fact that no issue of "piecemeal appeals" is here presented because the lower court's appointment of the receiver is conceded to be appealable and is being appealed. In addition, as noted above, appellee's argument erroneously assumes that the District Court's denial of Section 337 relief is unrelated to the granting of the request to appoint a receiver.



Furthermore, the policy against piecemeal appeals, upon which appellee purports to rely, would actually be best served by considering at this time the District Court's denial of Section 337 relief. Should the Court fail to decide the Section 337 question at this time, it will not be saving any judicial time since the identical issues will be presented once the District Court rules on the merits of the case. In this respect, appellant does not rely in support of his request for Section 337 relief upon any contested issues of fact, but solely on those facts set out in appellee's verified complaint. On the basis of these facts, appellant has sought a determination that as a matter of law he is entitled to relief under Section 337. Hence, a decision of the Section 337 issue by this Court at this time would probably prevent any further appeal. See Hurwitz v. Directors Guild of America, supra.

Appellee's argument that the denial of appellant's request for an injunction to prevent appellee from interfering with the business of the partnership is not appealable under 28 U.S.C. 1292(a)(1) is equally unfounded. In this respect, it is noted that the appellant's request for an injunction is not "ancillary" since appellee is the moving force in the disruption and destruction of the partnership and its business. However, even assuming that the injunctive relief requested is

ancillary, appellant's argument that the District Court's denial is not appealable is still wrong. In this regard, 28 U.S.C. §1292(a)(1) does not limit appeals for denials of injunctions to injunctions which are not ancillary, but applies to all denials of injunctions. Thus, under the broad language of Section 1292(a)(1), the denial of the injunction herein is appealable.

CONCLUSION AND REQUEST FOR  
EXPEDITED HEARING

Wherefore, appellant reiterates his request that this Court reverse the lower court's orders granting appellee's request for the appointment of the receiver and denying appellant's request for Title 41 D.C. Code Section 337 relief.

In addition, because of the severe injury being inflicted upon appellant as a consequence of the lower court's orders here sought to be reversed, appellant respectfully requests that an expedited hearing be granted in this cause.

Respectfully submitted,

JACOB P. BILLIG  
TERRENCE D. JONES  
1108 16th Street, N.W.  
Washington, D.C. 20036  
628-4717

January 18, 1971

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served in person a copy of the foregoing reply brief upon Messrs. David G. Bress and Thomas C. Green, 1700 Pennsylvania Avenue, N.W., Washington, D.C., counsel for appellee.

---

JACOB P. BILLIG  
1108 16th Street, N.W.  
Washington, D.C. 20036

Attorney for Appellant

Washington, D.C.  
January 18, 1971

